83-40

No. ....
IN THE

Supreme Court of the United States

October Term, 1983

MARY HEDLEY, HERB MCFARLAND, ASBERRY RAINEY, JR., FRANK SERPE and FRANK STAFFORD,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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QUESTIONS PRESENTED.

I.
Discovery.

A. Has the law on discovery declared by this Court been so seriously eroded by lower courts that certiorari should issue to review the denial of discovery in this age discrimination case in order to assure the proper administration of justice?

B. Did denial of discovery prevent plaintiffs (petitioners herein) from having an adequate opportunity to demonstrate that the proffered explanation of TWA (respondent herein) of its employment decisions was not the true reason but rather a prextext?

II.
Statistical Evidence.

A. As a matter of law, do 20 employees provide too small a group for statistical analysis to prove age discrimination?

B. Were plaintiffs denied due process when the district judge, sitting as trier of fact, used a "basic statistics" book without disclosing such use to the parties?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Mary Hedley, Herb McFarland, Asberry Rainey, Jr., Frank Serpe and Frank Stafford pray that a writ of certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on May 16, 1983, affirming the district court's judgment for TWA in this age discrimination case.

OPINIONS BELOW.

The opinions below are unreported. The opinion of the Ninth Circuit is attached hereto as Appendix "A". The opinion of the district court is attached hereto as Appendix "B".

JURISDICTION.

The Ninth Circuit affirmed the district court's judgment for TWA on May 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE.

The questions presented involve the Fifth Amendment to the United States Constitution and Federal Rules of Civil Procedure, Rules 26(a), (b)(1); 33(a), (b), (c); and 37(a). The texts of these are set forth in Appendix "C".

STATEMENT OF THE CASE.

1. Jurisdiction.

This is an action under the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. (ADEA). The case originated in the California superior court and was removed to the district court, which had jurisdiction under 28 U.S.C. §§1331, 1337, and 29 U.S.C. §626(c).

2. Procedural Chronology.

Plaintiffs served a first set of interrogatories, seeking to learn other claims of age discrimination against TWA. TWA refused to answer the interrogatories respecting other claims of age discrimination and plaintiffs filed a motion to compel answers (CT 39). Opposition papers by TWA (CT 42) and supplemental papers by plaintiffs (CT 44) were filed. The district court, without hearing (CT 41), denied plaintiffs' motion (CT 46). The case was tried to the district judge, without a jury, for eight days in 1981, at the conclusion of which the district judge announced his intended decision in favor of TWA (RT 1498-1507), followed by his Opinion (Appendix "B"). Judgment entered for TWA (CT 97A). Plaintiffs moved for a new trial on the ground that it had been improper for the district judge to use an undisclosed

"basic statistics" book (CT 99), TWA opposed the motion (CT 101), and the district court denied the motion (CT 103). Plaintiffs appealed to the Ninth Circuit, which affirmed (Appendix "A").

3. Facts.

The five plaintiffs were supervisors in TWA's Los Angeles reservations office when they were demoted involuntarily. As supervisors, plaintiffs held management positions. When demoted, plaintiffs lost their status as management employees.

The demotions were part of a company-wide reorganization. Selection of the people to be demoted involuntarily in the Los Angeles office was made by the 4 managers there. (The Los Angeles office had 24 management people: 4 managers and 20 supervisors.) Of the 20 supervisors, 11 were over 40 years old and 9 younger. One over 40 supervisor (Lanum) was scheduled for promotion as part of the reorganization; one under 40 supervisor (Von Gorres) voluntarily took a demotion; and 6 supervisors were demoted involuntarily in January 1977. All 6 employees demoted involuntarily were in the protected age group. Five of the 6 are plaintiffs in this case.

Between the reorganization and trial, 12 supervisor openings occurred in the Los Angeles reservations office. None of these jobs was offered to any plaintiff. (The foregoing are admitted facts in the Pre-Trial Conference Order, CT 67.)

TWA stipulated at trial that all 5 plaintiffs were qualified to be supervisors (RT 612/5-8). TWA's position at trial was that the people who were chosen to remain supervisors when plaintiffs were demoted and the people later selected over plaintiffs for promotion were better qualified than plaintiffs and that age played no part in the employment decisions (RT 49/22-25, 50/1-4). Dennis Fuerst so testified and he

was the person who selected plaintiffs for demotion (RT 807-808, 863). One of the persons (Adams) later selected for promotion over plaintiffs was thereafter fired for incompetence (RT 898-899).

The selection procedures used by TWA for the demotions and the later promotions were not validated personnel procedures. At trial these selection procedures were analyzed by Professor Driver, an expert in the field of organizational behavior, and he characterized them as poor procedures which lent themselves to highly subjective evaluations (RT 1361-1370, 1389-1406).

Plaintiffs attempted to prove discrimination two ways. First, plaintiffs attempted to prove a pattern or practice of TWA getting rid of older management employees in order to promote younger ones. This attempt to prove pattern or practice was frustrated, in the first instance, by plaintiffs' lack of discovery of other claims of age discrimination and the evidence which would have followed from such discovery, and at trial by the necessity of relying upon hearsay evidence, which was excluded upon TWA's objection (RT 139, 143-144, 149, 352, 353). Second, plaintiffs attempted to prove their case by statistical evidence. Two experts on statistics testified for plaintiffs, none for TWA. The district court found plaintiffs' proof inadequate.

REASONS FOR GRANTING THE WRIT.

This case presents important questions respecting discovery in general and both discovery and statistical evidence as they apply to an age discrimination case.

I.
DISCOVERY.

A. The Law on Discovery as Declared by This Court Has Been so Seriously Eroded by Lower Court Decisions (Where There Is a Split of Authority) That a Current Declaration Is Needed to Assure the Proper Administration of Justice.

Apparently liberality is still the rule in discovery, according to this Court. But there has been no recent discussion or affirmation by the Court that such is the rule. In *Texas Dept. of Com. Affairs v. Burdine* (1981) 450 U.S. 248, 258 the Court referred to the "liberal discovery rules". When the Court has occasion to refer to basic policy about discovery, it still refers to a 36 year old case, *Hickman v. Taylor* (1947) 329 U.S. 495. The other discovery case most often cited for the rule of liberal discovery likewise is of substantial vintage: *Schlagenhauf v. Holder* (1964) 379 U.S. 104.

Yet the rule of liberality has been so seriously eroded that in this ADEA case 5 plaintiffs who sought to regain management jobs were not allowed to discover other complaints of age discrimination. The district court cited no authority in its minute order denying discovery (CT 46) but TWA's opposition had cited 15 cases (CT 42), none of which was from this Court. The Ninth Circuit affirmed on the ground of no clear error, citing *Marshall v. Westinghouse Electric Corp.* (CA 5, 1978) 576 F.2d 588, 592, for the proposition that "(plaintiff must show peculiarized need and relevance to be entitled to company-wide discovery when only one

work unit is affected)." (Appendix "A" 1.)

Plaintiffs had relied upon the authority of this Court, citing *Hickman* and *Schlagenhauf* to the courts below.

Is the rule of liberality still the law? And, if so, how does it apply in a discrimination case?

There is a split of authority among the circuits respecting discovery in discrimination cases. Schlei and Grossman, Employment Discrimination Law (2d ed. 1983) states:

> "Many courts have broadly interpreted plaintiff's right to discovery in Title VII cases.[4]" p. 1271.

Footnote 4 lists 6 cases for this proposition and 7 against, with two circuits for and the Ninth Circuit against. A split of authority is grounds for review, of course. The split of authority shows the recurring nature of the problem.

It would appear both that the rule of liberality remains the law and that it should be applied to discrimination cases. The Court approved broad discovery in *United Airlines v. Evans* (1977) 431 U.S. 553, 558, when it stated that a discriminatory act which was not made the basis for a timely charge nonetheless ". . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." In part, this is the type of evidence plaintiffs sought to discover. In *Evans* the Court indicated that it continued to rely on *Hickman* and *Schlagenhauf*.

There is need for a current review of discovery by this Court to assure the proper administration of justice and to provide uniformity in the lower courts.

B. This Court Should Declare That Discovery May Not Be so Restrictive as to Prevent Discrimination Plaintiffs From Having "an Adequate Opportunity" to Demonstrate That an Employer's Proffered Reason for Employment Decisions Was Prextext.

Discrimination claimants are entitled to a "full and fair opportunity" to show that an employer's non-discriminatory explanation is a pretext. *McDonnell Douglas Corp. v. Green*

(1973) 411 U.S. 792, 805. Unlike *United States Postal Service v. Aikens* (1983) ___ U.S. ___, fn. 5, 103 S.Ct. 1478, 1482, where the claimant did not complain that he was not afforded an adequate opportunity, the plaintiffs in this case do contend that they have been deprived of such opportunity by the lower courts' rulings that denied them discovery of other claims of age discrimination.

The claimant always bears the burden of proof. *Aikens*, supra. And there will seldom be "eyewitness" testimony as to the employer's mental process. *Ibid.* Thus, where the employer does not openly state that age was a consideration in its questioned employment decision, the claimants must rely on proof of pattern or practice, corporate policy, and statistical evidence. The rulings below re discovery took away from plaintiffs the opportunity to prove pattern or practice or corporate policy, and this deprived plaintiffs of the opportunity to show that TWA's explanation was pretext.

The explanation of TWA was that age was not even consid ed in demoting plaintiffs or in selecting others thereafter for promotion. TWA explained that it simply sought the best qualified people.

To overcome that explanation plaintiffs tried to show TWA's custom or practice of getting rid of older management employees to make room to promote younger people into management, but this attempt was excluded as hearsay.

Plaintiffs also showed, by expert testimony, that the questioned employment decisions involved highly subjective assessment procedures that had never been validated. In a Title VII case the lack of validation would allow claimants to prevail, probably, but in an age case, where the ADEA does not expressly require validation of assessment procedures, a trier of fact need not give lack of validation and the resulting subjective nature of the decision making any

particular weight. Perhaps the "reasonable federal standard" used to test employment practices in ADEA cases (*E.E.O.C. v. Wyoming* (1983) ___U.S. ___, 103 S.Ct. 1054, 1062) includes this consideration, but the Court has not yet said so. The district court commented that under the ADEA an employer is not held to any particular standard in carrying out its employment decisions (Appendix "B" 23). The Ninth Circuit affirmed, stating it found the "productivity rating system" (the one used in connection with demotions) all right and making no comment on the interview system used for promotions (Appendix "A" 2).

Thus plaintiffs were left solely with statistical evidence to carry their burden of persuasion that TWA's explanation was pretext. The courts below found that insufficient.

Plaintiffs' frustration at trial was so apparent that it elicited the following comment from the district judge:

> ". . . [P]laintiffs somehow complain that they didn't get all they wanted to get or think that they ought to get or to have obtained from the defendant. The discovery system that applies under the Federal Rules of Civil Procedure is totally effective if used." (RT 478/4-8)

The bitter irony of that remark was reinforced by the district judge's comment after both sides rested, included in his Opinion:

> "Now, the Court finds that there is not one shred of competent credible evidence, direct evidence, that the defendant engaged in any way toward these plaintiffs on the basis of age discrimination motive." (RT 1500/11-14, Appendix "B" 23.)

The district judge in his Opinion stated that plaintiffs had not shown that the people who made the employment decisions of which plaintiffs complain had been ". . . under instructions or directions or the belief that the corporate

policy was as contended by the plaintiffs. . .'' (Appendix ''B'' 27.) The Ninth Circuit held that plaintiffs failed to prove ''. . . that TWA's articulated legitimate business reasons were pretextual.'' (fn. 2 omitted, Appendix ''A'' 2.).

The fact situation from which this case arose involved *management* employees. The corporate policy of getting rid of older management people in order to bring along younger ones would not have arisen in a place like the Los Angeles reservations office. That sort of policy originates at corporate headquarters (New York) and is simply followed at places like plaintiffs' work place. Plaintiffs tried to get admissible evidence of the corporate policy by this discovery.

The reorganization which resulted in demotion of plaintiffs was system-wide. In the Pre-Trial Conference Order (CT 67) TWA explained its reorganization as including the following objective:

''(e) to establish promotional opportunities;'' (CT 67/8.) Those promotional opportunities, into the management ranks, were being created for younger employees at the expense of older employees. In *E.E.O.C. v. Wyoming*, *supra*, this Court noted the Congressional findings in the preamble to the ADEA that ''. . . older workers find themselves disadvantaged in their efforts to retain employment . . .'' and the Senate committee's comment that both corporate and government managers ''. . . create an environment where young is sometimes better than old.'' 103 S.Ct. 1058, n.3, 1059.

Plaintiffs needed this discovery in the worst way to prove their case. When the lower courts denied plaintiffs this discovery, they made it impossible for plaintiffs to have a ''full and fair opportunity'' to show that TWA's explanation was pretext. This issue is worthy of the Court's consideration since the Court never has dealt with a case where such ''full and fair opportunity'' was denied.

II.
STATISTICAL EVIDENCE.

A. Since 20 Employees is the Minimum Jurisdictional Number for the ADEA to Apply, It Is Error to Hold as a Matter of Law That 20 Employees Is Too Small a Group for Statistical Analysis to Prove Age Discrimination.

Congress chose to apply the ADEA to employment groups as small as 20. 29 U.S.C. §630(a). In this case the group of supervisors from whom 6 were to be demoted involuntarily was exactly 20. All 6 chosen for involuntary demotion were in the protected age group. (The group consisted of 11 over 40 years old and 9 younger.) Plaintiffs are 5 of the 6 so demoted.

At trial plaintiffs presented statistical evidence by two experts: Dr. Pfeffer and Professor Driver. Dr. Pfeffer analyzed the situation at the time of the reorganization when the demotions took place. (RT 210-219, 271-281.) Professor Driver analyzed the subsequent TWA histories of the supervisors at the time of the reorganization; his analysis was of their employment careers after the reorganization. (RT 1411-1415, 1418-1425.) Both experts testified that, based on their statistical analyses, age was a determining factor in TWA's employment decisions involving plaintiffs. (RT 211-214, 1414.)

This statistical evidence was uncontradicted. (The record discloses no contrary evidence; however, the possibility that the district judge may have considered evidence outside of the record by using a "basic statistics" book is discussed below.)

The district judge rejected the statistical evidence of both experts on the ground that the sample was too small (Appendix "B" 15, 24). Since this evidence was uncon-

tradicted, the district court in rejecting it made its ruling as a matter of law. (With respect to the statistical analysis of Professor Driver, the district court expressly found that the figures on which the expert based his analysis were accurate. Exhibit "B" 21).

Rejection of statistical evidence in discrimination cases because the group being analyzed was too small has occurred in several cases, but in none of those cases was the group as large as 20. See, e.g., footnote 7 in the dissent to *Connecticut v. Teal* (1982) ___ U.S. ___, 102 S.Ct. 2525, 2539. In *Teal,* 13 was the largest group that had been held to be too small. The Ninth Circuit affirmed this point on the basis of *Morita v. Southern California Permanente Medical Group* (CA 9, 1976), *cert. den.*, 429 U.S. 1050 (1977), a case in which the group being analyzed totaled 7. (Appendix "A" 2.)

If 20 employees is too small a group for statistical analysis, as a matter of law, then the ADEA's purpose will be thwarted if an employer with the minimum jurisdictional number of employees simply avoids saying that age was a factor in any questioned employment decision.

The record in this case offers persuasive reasons for not allowing the salutory purposes of the ADEA to be undercut in this manner.

The experts fully explained their analyses and opinions; the district judge again and again questioned them on the topic of what the district judge called "sample size"; and after the experts repeatedly explained why the employee group being analyzed was sufficiently large (RT 226-229, 274-275), the district judge rejected their uncontradicted testimony.

Plaintiffs submit that it was error for this uncontradicted statistical evidence to be rejected as a matter of law. (The

possibility that the district judge regarded something in the "basic statistics" book which he used during the trial as furnishing "evidence" contrary to the experts' testimony is discussed below. Here it is assumed that only the matters received in evidence at trial were considered.)

The common law rules respecting conclusiveness of expert testimony show why this was error:

> "On matters not exclusively within the expert's knowledge, expert testimony is not conclusive . . . even though uncontradicted . . .
>
> "Where, however, the subject under consideration is within the knowleldge of experts only, and not within the knowledge of laymen, the trier of facts ordinarily may not disregard their testimony, even if it is contradicted by non-expert evidence; and in such cases it is usually conclusive on the issues regarding which the opinion is offered." 31 Cal.Jur.3d, Evidence §514 (notes omitted.)

These rules apply, not the ones stated in the district court's opinion (Exhibit "B" 24-25). Statistics is a science within the knowledge of experts only. The district judge acknowledged that he is not such an expert. (RT 1423/14-20.) It was error for the district judge to place his own opinion respecting sample size above the uncontradicted expert testimony adduced at trial.

This case is another example of the "inexorable zero" noted in *Teamsters v. United States* (1977) 431 U.S. 324, 342 n. 23. Only persons in the age protected group were involuntarily demoted from management jobs. The Court should declare that when the minimum jurisdictional number of 20 employees is present and the ADEA's protection is invoked, an employer's selection decisions will not be immune from statistical analysis because the employee group is only 20.

B. Plaintiffs Were Denied Due Process When the District Judge Used a "Basic Statistics" Book During Trial Without Disclosing Such Use.

The district judge used a "basic statistics" book during trial. (CT 99/3-4.) This use was not known to plaintiffs' counsel until several weeks after the trial had ended. (CT 102.) Plaintiffs moved for a new trial on the ground that the undisclosed use of such a book was legally improper (CT 99) and the district court denied the motion (CT 103). The Ninth Circuit affirmed without analysis: "Appellants' remaining arguments are without merit." (Appendix "A" 2.)

It is a truism that the trier of fact may not legally receive evidence or factual information bearing on the issues he is to decide except by evidence adduced at trial. *People v. Archerd* (1970) 3 Cal.3d 615, 91 Cal.Rptr. 397; *Hartford Acc. & Ind. Co. v. WCAB* (1982) 132 Cal.App.3d 796, ___ Cal.Rptr. ___. If a juror had used a book on basic statistics while serving on this case, such use would have constituted misconduct. The seriousness of such misconduct would have required a new trial.

There should be no different result because the trier of fact was a judge rather than a juror.

The record discloses various things that bring into clear focus the prejudice to plaintiffs of the undisclosed use of such a book. First, the district judge told the parties during trial that he was not a statistician. (RT 1423/14-20.) Thus the prejudicial nature of undisclosed use of such a book is apparent. The book was hearsay and was not subject to cross-examination, or rebuttal. (Despite the abundance of exceptions, hearsay is still basically objectionable. Plaintiffs' attempt to prove TWA's custom and practice was excluded because the proffered evidence was hearsay.) The

book would appear to be the only source of evidence that could furnish contradiction of the testimony of plaintiffs' experts.

Did the book on basic statistics contain material that led the district judge to reject the testimony of plaintiffs' experts?

Possibly.

And therein lies the unfairness. This situation is analogous to the one in *Lynn v. Regents of The University of California* (CA 9, 1981) 656 F.2d 1337. In *Lynn* the plaintiff-teacher was not allowed to see her tenure review file. In the case at bench, plaintiffs never knew of, nor saw, the basic statistics book. In *Lynn* the trial court said it received the tenure file only for the purpose of an *in camera* review in order to rule on The Regents' claim that the file was confidential, but in the trial court's Memorandum there were various assertions for which there were no bases in the record. The same is true in the case at bench.

> "The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court." 656 F.2d at 1346-7.

Reversal likewise is required here. The Court has not previously passed on this issue in the context of a trial to a

judge without jury. (Cf. *Mattox v. United States* (1892) 146 U.S. 140 and *Parker v. Gladden* (1966) 385 U.S. 363 dealing with jury trials.)

Respectfully submitted,

AMIL ROTH,

Attorney for Petitioners.

APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Mary Hedley, Herb McFarland, Asberry Rainey, Jr., Frank Serpe and Frank Stafford, Plaintiffs-Appellants, vs. Trans World Airlines, Inc., Defendant-Appellee. NO. 82-5607, USDC NO. CV 79-907-RJK.

Argued and Submitted; April 5, 1983.

Appeal from the United States District Court for the Central District of California Hon. Robert J. Kelleher, District Judge Presiding.

Before: CHAMBERS, ANDERSON, and NELSON, Circuit Judges.

Filed May 16, 1983.

Appellants Mary Hedley, Herb McFarland, Asberry Rainey, Jr., Frank Serpe and Frank Stafford appeal from the district court's decision on their Age Discrimination in Employment Act (ADEA) claim arising from allegedly discriminatory acts by their employer, appellee Trans World Airlines, Inc. (TWA). We affirm.

Appellants first contend that the court abused its discretion in denying a motion to compel further answers to interrogatories on the ground that they were burdensome, irrelevant, and not likely to lead to the discovery of relevant evidence. Appellants have failed to show that the court's decision was based on a clear error of judgment. *See O'Brien v. Sky Chiefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982); *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). *See also Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978) (plaintiff must show peculiarized need and relevance to be entitled to company-wide discovery when only one work unit is affected).

Appellants next contend that the district court clearly erred in finding that the testimony of appellants' statistical experts was entitled to little weight. We find no reason here to disturb the court's finding. The court was entitled to conclude that statistical evidence derived from an extremely small universe has little predictive value. *See Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). More fundamentally, the trial court is in the best position to appraise the credibility of witnesses. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 414 (9th Cir. 1978).

Even if we assume that the court's finding was clearly erroneous, it was harmless error,[1] because appellants failed to prove that age was a "determining factor" in TWA's actions, *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981), or to demonstrate that TWA's articulated legitimate business reasons were pretextual.[2] *Douglas v. Anderson*, 656 F.2d 528, 531-35 (9th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411-12 (9th Cir. 1981). Appellants' remaining arguments are without merit. Accordingly, the district court's decision is AFFIRMED.

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[1]The harmless error rule is well-established in this Circuit. *See, e.g., United States v. Holley*, 493 F.2d 581, 589 (9th Cir.), *cert. denied*, 419 U.S. 861 (1974).

[2]We note that appellants neither pled nor proved disparate impact in this case. The productivity rating system used as the basis for TWA's employment actions here appears to represent a "reasonable measure of job performance." *See Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

APPENDIX B.

Memorandum of Decision and Order.

United States District Court, Central District of California.

Mary Hedley, Herb McFarland, Asbery Rainer, Jr., Frank Serpe and Frank Stafford, Plaintiffs, v. Trans World Airlines, Inc., Defendant. No. CV 79-0907-RJK (Tx.).

Filed April 8, 1982.

Plaintiffs Mary Hedley, Herb McFarland, Asbery Rainer, Jr., Frank Serpe and Frank Stafford ("plaintiffs") filed this action for injunctive relief and compensatory damages against defendant Trans World Airlines, Inc. ("TWA"). Plaintiffs allege that TWA discriminated against them on the basis of their age by reducing their status, in January 1977, from Supervisor, Reservations management positions to non-management Team Coordinator positions, and by thereafter refusing to promote them to Supervisor, Reservations positions, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* ("ADEA").

Plaintiffs filed their original complaint on January 26, 1979 in Superior Court of the State of California for the County of Los Angeles, alleging violation of ADEA and California age discrimination laws. TWA thereafter removed the action to this Court. On June 7, 1979 this Court ordered plaintiffs' state claims dismissed without prejudice and on June 26, 1979 this Court amended that order to remand plaintiffs' state claims to Superior Court.

Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1337 and 29 U.S.C. § 626(c). TWA is a Delaware corporation and is a certificated air carrier engaged in interstate commerce in the business of providing airline transportation and cargo services. At all times material herein, TWA has employed more than twenty (20) employees for

each working day in each of twenty (20) or more calendar weeks in each year. The alleged unlawful employment practices took place at TWA's reservations office located at 1543 Shatto Street, Los Angeles, California ("the Los Angeles office").

Plaintiffs allege that on or about January 1977, they selected plaintiffs Rainey and Stafford to present complaints of age discrimination to the California Fair Employment Practices Commission ("FEPC") on behalf of all plaintiffs. Plaintiffs Stafford and Rainey visited the FEPC on January 25, 1977 and March 10, 1977, respectively; there they completed a pre-complaint questionnaire and discussed their allegations with an FEPC representative. Plaintiffs Stafford and Rainey allege they were advised by FEPC personnel that the FEPC would not handle plaintiffs' claims because all plaintiffs were in their forties. The FEPC personnel allegedly directed plaintiffs to consult the United States Department of Labor ("DOL"). Plaintiffs Stafford and Rainey further maintain that they reported these events to the other plaintiffs. Finally, plaintiffs allege that in reliance on the FEPC representatives' statements they did not file verified complaints with the FEPC before presenting their claims to the DOL, which claims were filed about or before March, 1977. By letter dated May 2, 1977, the plaintiffs jointly filed their sixty (60) day notice of intent to sue TWA with the DOL. In or about June 1977, the DOL engaged in conciliation efforts with TWA on plaintiffs' behalf. DOL subsequently issued a right to sue letter. Plaintiffs submitted verified complaints to the FEPC on April 3, 1980, which were refused as untimely.

Venue is invoked on the grounds that the alleged discriminatory employment practices occurred in the Central District of California and that plaintiffs Hedley, McFarland and Rainey and defendant TWA for purposes of venue reside in the Central District of California.

A. The Agreed Facts.

The parties stipulated to these facts:

(1) Plaintiff Mary Hedley commenced her employment with TWA on June 8, 1952 at TWA's Indianapolis, Indiana reservations office as a Reservations Sales Agent. In or about June 1956 Hedley laterally transferred to the Los Angeles office as a Reservations Sales Agent. Hedley is and was at all times subsequent to this transfer employed at this reservations office. In December 1957 Hedley was assigned as Lead, Reservations Sales Agent, and in December 1960 she was assigned as a Reservations Training Agent. Hedley was involuntarily demoted to Reservations Sales Agent in August 1963. In July 1965 Hedley was promoted to Lead, Reservations Sales Agent, a position she held until 1969. Hedley was promoted to Chief Reservations Sales Agent, later entitled Supervisor, Customer Services-Reservations, in December 1969 and held that position until January 1977, when she was assigned to Manpower Coordinator, her current position. Hedley's date of birth is October 23, 1927.

(2) Plaintiff Herb McFarland commenced his employment with TWA on June 16, 1959 at TWA's Los Angeles office as a Reservations Sales Agent. McFarland is and was at all times since his hire employed at this reservations office. In or about March 1966 McFarland was promoted to Lead Agent, a position he held until November 1969. In December 1969 McFarland was promoted to Chief, Services, which was a management position. Thereafter, McFarland was assigned as Chief, Telephone Sales, in December 1971, Chief, Reservations Sales/Services, in June 1972 and Supervisor, Customer Service-Reservations, in June 1973. McFarland held the Supervisor, Customer Services Reservations position until January 1977 when he was

assigned to Sales Effectiveness Coordinator, his current position. McFarland's date of birth is September 27, 1935.

(3) Plaintiff Asbery Rainey, Jr. commenced his employment with TWA on May 5, 1960 at TWA's Los Angeles office as a Reservations Sales Agent; Rainey is and was at all times since his hire employed at this reservations office, except for a brief break in service in 1961. According to TWA records, April 11, 1961 is Rainey's company seniority date. In March 1966 Rainey was promoted to Lead, Reservations Sales Agent, a position he held until December 1969, when he was assigned to a Senior, Reservations Sales Agent position. In August 1972 Rainey was promoted to Chief Passenger Telephone Sales, later entitled Supervisor, Customer Services-Reservations, a management position. In January 1977 Rainey was assigned to a Team Coordinator position, his current position. Rainey's date of birth is May 7, 1933.

(4) Plaintiff Frank Stafford commenced his employment with TWA on May 15, 1956 at TWA's Los Angeles reservations office as a Reservations Sales Agent; Stafford was continuously employed at this reservations office during his employment with TWA. In November 1961 Stafford was promoted to Lead, Reservations Sales Agent position. In March 1967, after working approximately four months as Acting Chief, Stafford was promoted to Chief, Reservations Sales and Services, a management position. The Chief, Reservations Sales and Services position was retitled Supervisor, Customer Services-Reservations in 1976 and plaintiff remained in that position until January 1977 when he was assigned to a Team Coordinator position. On August 13, 1979 Stafford, by letter, retired from TWA, effective August 31, 1979, claiming he resigned because of continuing age discrimination. Stafford's date of birth is March 19, 1929.

(5) Plaintiff Frank Serpe commenced his employment with TWA on April 11, 1960 at TWA's Chicago, Illinois reservations office as a Reservations Sales Agent. In May, 1961 Serpe was promoted to Lead, Reservations Sales Agent. In May, 1963 he was promoted to Chief, Reservations Sales Agent, a management position. In April, 1968 Serpe was laterally transferred to TWA's Phoenix, Arizona reservations office as a Chief, Reservations Sales Agent. Serpe laterally transferred to the same position at TWA's Los Angeles reservations office in February 1971. Serpe worked at TWA's Los Angeles office as a Chief, Reservations Sales Agent, which was later retitled Supervisor, Customer Services-Reservations, until January 1977 when he was assigned as Team Coordinator. On January 25, 1977 Serpe, by letter, requested a two-year educational leave of absence effective February 7, 1977, and requested permission to engage in other employment while on such leave of absence. On January 13, 1977 TWA granted Serpe's requests. On December 28, 1978 Serpe resigned his employment with TWA, claiming he resigned because of continuing age discrimination. Serpe's date of birth is February 3, 1928.

(6) In May, 1976, TWA began to consider and develop a reorganization plan for its eight domestic reservations offices. According to TWA, this restructuring was designed to meet the following objectives.

First, TWA wanted to improve communications between management and non-management personnel.

Second, TWA wanted to redefine the supervisor's role so as to allocate more supervisor time to the important task of training, motivating, and leading reservations sales agents, and less time to handling day-to-day technical problems. These technical problems were instead to be handled by non-management specialists filling newly-created "coordinator" positions.

Third, TWA wanted to improve its performance in both of the two basic markets served by the reservations offices — General Public and Agency/Commercial. By recognizing the unique natures of both markets, TWA particularly hoped to strengthen its position with the travel agency community.

Fourth, TWA wanted to improve its performance in the area of planning and cost control, and, in particular, to formally recognize tasks performed by personnel but not supported in the budget.

Fifth, TWA wanted to establish promotional activities. Finally, defendant wanted to establish a uniform organizational structure for its eight domestic reservations offices, located in Boston, New York, Philadelphia, Pittsburgh, Chicago, St. Louis, Los Angeles, and San Francisco.

(7) The process that led to reorganization required coordination and cooperation between TWA's Reservations Marketing staff and TWA's line managers, i.e. managers of local reservations offices. The reorganization plan also required approval by TWA's top management.

In May, 1976 a Reservations Marketing task force began studying the current reservations organizational structure. In summer, 1976, the task force presented a generalized reorganization concept to TWA's regional vice presidents and reservations office managers. Reservations Marketing then met with the managers of the St. Louis, Pittsburgh and Philadelphia reservations offices and applied the concepts of this initial application. The results were then presented to top management for general approval. After obtaining approval from top management, Reservations Marketing began implementation at each office.

(8) As part of the reorganization, TWA defined, and in some instances, revised, the responsibilities of office staff members. "Managers" were to be, and are now, primarily

responsible for overseeing their department's attainment of its revenue goals and for developing and coaching supervisors.

"Supervisors" directly supervise a coordinator (usually one) and team members (usually forty reservations sales agents, as opposed to twenty prior to the pre-reorganization). Supervisors' primary responsibilities toward team members are to aid their professional and personal development and to motivate them to achieve individual and team objectives (e.g., revenue generation and the productive use of time). Supervisors use both positive reinforcement and disciplinary measures to influence employee performance.

TWA officially defines the team coordinator's primary responsibility as providing a ready source of technical knowledge, including knowledge of industry and airline services and fares, to the reservations sales agents. In addition, they handle irate callers and complaint correspondence, coordinate any research required to solve such problems, and, when required, respond in writing to complaint letters or calls. Coordinators do not supervise reservations sales agents.

"Manpower coordinators" establish the manpower shift requirements and administer the shift bids to meet those requirements. They also inform supervisors of events, such as vacations, which relate to manpower availability. Finally, they shift the manpower resources within the office, as conditions warrant, to meet short-term needs.

(9) Reservations Marketing reached agreements with each reservations office regarding proposed organizational changes, including changes in the number of management and non-management positions. Because of the varying sizes and peculiarities of each office, there were minor variances among them, but the overall objectives were as outlined

above.

In Los Angeles prior to the January 1977 reorganization, there were 4 managers (Reservations, Telephone Sales, Services and Communications), 20 Supervisors, Reservations, 20 non-management specialists (i.e., shift aids, manpower coordinator), including 18 budgeted and 2 non-budgeted specialists, and 6.5 clerical personnel for a total office head count of 50.5. Reservations Marketing proposed a staffing which required fewer management employees but more non-management specialists. Specifically, it was proposed that there would be 5 managers (Reservations, Public Sales and Services, Agency Commercial Sales and Services, Reservations and Administrative Services and Planning and Cost Control), 11 supervisors, 27 non-management specialists, including new coordinator positions, and 6.5 clerical personnel, for a total head count of 49.5.

(10) To accomplish the pending reorganization, TWA instructed managers at the Los Angeles office to meet with their Supervisors, Reservations ("supervisors") and to evaluate them. Sixteen of the supervisors, including all of the plaintiffs, reported to Dennis Fuerst. Fuerst was then Manager, Public and Agency Telephone Sales, and had been plaintiffs' supervisor since May 1975. The other four supervisors reported to other managers. After evaluating his sixteen supervisors, Fuerst developed a rank ordering as to their relative abilities and job performances. (See Table I for the parties' stipulated summary of the monthly salaries of the sixteen supervisors evaluated by Fuerst at the time of their December 1976 evaluation).

(11) Based on his review, Fuerst ranked the plaintiffs' performance as the lowest of his supervisors and considered them least likely to capably perform the revised duties of supervisor. In December 1976, the managers at the Los Angeles office held a meeting to determine the reassignment

of supervisor personnel. Reassignments were based upon the recommendation of the supervisors' manager and upon the number of current supervisors the manager could retain. Fuerst was advised that he could retain eleven of his sixteen supervisors. Fuerst therefore recommended that the five lowest supervisors in his rank ordering be assigned to Team Coordinator positions. Fuerst's supervisor, Kay Bergs, concurred in this recommendation and plaintiffs' job assignments were subsequently changed.

(12) The planned reorganization for the Los Angeles office was announced in a memo from Kay Bergs to all reservations employees dated January 5, 1977 and entitled "Reservations Reorganization." It was announced that the reorganization would be phased in between January and March 1977 and that the reorganization would result in fewer management employees, particularly supervisors. In January, 1977, Fuerst told each of the plaintiffs of their change from supervisor positions to Team Coordinator positions.

(13) The supervisors at the Los Angeles office who changed positions or retired following the reorganization, but not necessarily as a part thereof, are listed at Table II.

(14) After the reorganization there were twelve supervisors, two Managers, Fuerst and Spooner, and two Acting Managers, W. Ken Hall and P. Lanum, in the Los Angeles Office. Eleven of the twenty pre-reorganization supervisors, including plaintiffs, were over the age of forty; nine were under forty. The pre- and post-reorganization supervisors, except plaintiffs, their dates of birth, and their TWA job histories, as stipulated by the parties, are listed at Table III.

The dates of birth of D. Fuerst and W. Spooner, the pre-reorganization managers, are 5/23/42 and 11/19/26, respectively. The dates of birth of P. Lanum and W. Ken Hall are 4/03/21 and 6/13/43, respectively.

(15) When the DOL attempted conciliation between plaintiffs and TWA in June, 1977, plaintiffs took the position that they had been demoted because of their ages and sought back pay and reinstatement. TWA took the position that the reassignment of plaintiffs was not based on their age and therefore refused to reinstate plaintiffs or pay them back wages.

(16) In September 1977, plaintiffs Hedley, McFarland, Rainey and Stafford applied for supervisor openings in response to TWA Job Opening Announcement ("JOA") 77-531. They were interviewed by a three-person panel, comprised of Pearl Lanum, Dennis Fuerst and William Spooner, in September 1977. None of the applicant plaintiffs was selected for the position. On November 7, 1977, applicants Ken Hall, Vera Reichardt and Neil Ahern and on November 14, 1977 applicant Lucy Scott were selected for the openings. Their dates of birth and TWA job histories, as stipulated by the parties, are set forth at Table IV.

(17) In June 1978, TWA posted JOA 78-571 for a supervisor job opening. None of the plaintiffs submitted a PER-288* with respect to this opening. Applicant Susan Shepherd was selected for the opening; her date of birth and TWA job history are set forth at Table V.

(18) In September, 1978, plaintiff McFarland applied for a supervisor opening in response to JOA 78-584. McFarland was neither interviewed nor selected for the position. Applicant Robert Von Gorres, a former supervisor, was selected for the position on September 25, 1978; his date of birth and TWA job history is set forth below at Table VI.

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[2]A "PER 288" is the application form submitted by TWA employees when seeking a position within TWA.

(19) In February, 1979, plaintiffs McFarland and Rainey unsuccessfully applied for supervisor openings in response to JOA 79-511. They were interviewed by a two person panel, consisting of Chuck Hite and Dick Carroll. On March 12, 1979, applicants Nancy Geraths and Kathy Underwood and on March 26, 1979, applicants Dean Lefstad and Carol Adams were selected. Their dates of birth and TWA job histories, as stipulated by the parties, are set forth at Table VII.

(20) On February 8, 1977, plaintiff Serpe commenced employment with Club-Med, Inc., in Scottsdale, Arizona as Assistant Reservations Manager. Thereafter, he was employed as a Reservations Manager, his current position.

(21) Plaintiff Stafford is currently employed as Director of the Atascadero, California Chamber of Commerce.

The parties state some "reservations" with respect to the aforesaid agreed facts. None of the stated reservations is significant except to cast some argumentative light thereupon.

2. Issues Remaining to be Litigated.

The parties agreed that the following issues remained to be litigated:

(1) Were plaintiffs changed from management supervisor positions to non-management Team Coordinator positions in January 1977, and thereafter not promoted to supervisor positions because of age discrimination?

(2) Did plaintiffs Serpe and Stafford resign their employment with TWA because of TWA's alleged continued age discrimination?

(3) Have plaintiffs suffered any damages as a result of TWA's conduct and, if so, in what amount?

(4) Did plaintiffs Serpe and Stafford make reasonable efforts to mitigate their damages, if any, after terminating

their employment with TWA?

(5) Are plaintiffs Hedley, McFarland and Rainey entitled to reinstatement as supervisors?

The issue of damages having been bifurcated, the Court will only address the first two issues regarding liability. As the Court finds that defendants did not discriminate against plaintiffs on the basis of age, the Court need not reach the last three issues regarding damages.

The dispositive issue on liability can be stated quite simply: Did defendants, in their initial demotion of plaintiffs under the reorganization plan and in their subsequent failure to promote plaintiffs, discriminate against these plaintiffs on the basis of age?

The Court finds that plaintiffs have proved a prima facie case of age discrimination against the defendant. However, the Court further finds, upon all the evidence before the Court, that the plaintiffs have failed to carry their burden of proving, by a preponderance of the evidence, that defendants' acts and omissions were unlawfully discriminatory.

3. Plaintiffs' Case in Chief.

The Court reaches its conclusion that plaintiff proved a prima facie case by a narrow margin. The Court, as it did upon consideration of defendant's Rule 41(b) motion to dismiss at the close of plaintiffs' case in chief, presently views the evidence of a prima facie case in a light most favorable to the plaintiffs. The "statistical case" presented by plaintiffs' expert is included in the evidence favorably reviewed.

A scholarly gentleman named Pfeffer was called as plaintiffs' statistical expert. After considering various hypothetical questions, he opined that defendant's treatment of plaintiffs showed discrimination and that there was a strong basis for believing that defendant had a prejudice against persons

over 40 years of age. His testimony was obviously biased in favor of his employers, the plaintiffs. His presentation was argumentative in tenor, tone and substance. His sample was small and hence of questionable reliability. He refused to acknowledge the relevance of sample size as an indication of reliability. He predicated his marginal determination of bias on a hypothesis which excluded a highly relevant factor: an under-forty supervisor who, like the plaintiffs, was demoted in Los Angeles.

Additionally, as part of their case in chief, plaintiffs presented the testimony of one Shelley Samuels, an EEOC investigator. Samuels' testimony concerned his investigation of the defendant and his pre-litigation efforts at conciliation of the dispute. He was proffered, apparently, as an expert witness, as well as for other purposes. Predictably he opined that five demoted persons over 40 years of age were as qualified or more qualified than at least two persons under 40 years of age who were not demoted. Further, he testified that two of four younger promotees were not as qualified as four of the plaintiffs. He predicated his opinion on his educational background, his general experience, his review of defendant's records, and his conversations with defendant's employees.

Samuels was wholly biased. He sought to demean the defendant as non-cooperative in the production of its records, yet admitted that he never utilized his available subpoena power to acquire the records. Indeed, it appeared that he had, in fact, examined the relevant records. However, he seemed disinclined to make a thorough examination of employee records, stating that the discovery of merely one under-forty employee who was not demoted was sufficient for him to conclude that there was age discrimination against the plaintiffs. His opinion testimony is rejected insofar as it seeks to determine the ultimate issue of whether the de-

fendant was guilty of age discrimination. The balance of his testimony constituted no more than an analysis of the company records, all of which are in evidence before the Court and which will be weighed by the Court as the trier of fact.

Each plaintiff testified and charged the defendant with age discrimination. The only objective evidence of age discrimination offered by the plaintiffs was their testimony that none of them knew of any TWA employee who continued working to age 65. The Court discounts such evidence as proof of age discrimination for two reasons. First, none of the plaintiffs who so testified established sufficient familiarity with the defendant's many employees to validate their conclusion that there were no employees who stayed on to age 65. Second, plaintiffs' testimony simply did not establish that the absence of older persons was caused by age discriminatory conduct of defendant.

The Court was unsuccessful in its attempt to elicit from the employee witnesses their knowledge of the promulgation by defendant of any policy of age discrimination. The only testimony that touched on any possible policy of age discrimination by defendant was the ambivalent statement of one employee who had resigned from TWA and who testified that a co-worker stated to the witness that "you and I just won't make it together." Its probative force is not clear.

4. TWA's Evidence.

The defendant's principal witness was Denny Fuerst, the Los Angeles reservations office manager from May, 1975 through the time period involved in this case. As a TWA manager and as plaintiffs' supervisor, Fuerst was defendant's principal agent as to all plaintiffs' claims of age discrimination.

Fuerst supervised the plaintiffs and prepared and conducted their performance reviews. Generally, supervisors' performances are reviewed annually by their manager. These written management performance reviews assess a supervisor's performance in various job-related areas, utilizing a numerical rating system coupled with the manager's written comments. These management performance reviews are discussed between the supervisor and manager.

At all times relevant herein, TWA has had training programs and policy manuals to inform managers how to evaluate and review their supervisors and to establish the standards by which they should be evaluated. While working for TWA and prior to Fuerst's assignment as a Los Angeles reservations office manager, Fuerst had supervised management employees and had been trained to conduct, and had conducted, their performance reviews. Fuerst conducted plaintiffs' management performance reviews in accordance with TWA's guidelines and standards.

Fuerst conducted his first performance review of plaintiffs, except for McFarland, in January, 1976. When Fuerst evaluated his sixteen supervisors, and ranked their job performance in December, 1976, his evaluations were based upon his observations of their performance in the 1½ years he had been a manager. In preparing his ranking, Fuerst read his supervisors' most recent management performance reviews, if any, assessed their current performance and prepared management performance reviews for each supervisor (except for Randy Garfield). The qualities sought by TWA and evaluated by Fuerst included the ability to motivate and lead an expanded number of reservations sales agents (forty agents as opposed to the pre-reorganization level of twenty), productivity, technical knowledge and communication skills. The plaintiffs' ages had nothing to do with Fuerst's ranking. At the time Fuerst prepared the ranking, he was generally

aware that plaintiffs Hedley, Rainey, Serpe and Stafford were over the age of forty. Fuerst was neither instructed by anyone at TWA to consider a supervisor's age in preparing his ranking nor believed that TWA disfavored older (i.e., age forty and older) employees.

Denny Fuerst ranked his supervisors as follows: (1) S. Guerra; (2) Ron Von Gorres; (3) R. Garfield; (4) G. Artz; (5) M. Trenkle; (6) J. Ewing; (7) G. Grabowski; (8) N. Catalan; (9) H. Davila; (10) R. Strauch; (11) M. Blackwell; (12) F. Serpe; (13) F. Stafford; (14) M. Hedley; (15) H. McFarland; and (16) A. Rainey. Fuerst ranked the plaintiffs lowest in ability and performance because he believed their work, though satisfactory, was not as good as the other supervisors. In particular, Fuerst believed that plaintiffs were less able to lead and motivate reservations sales agents — the primary function of supervisors after the reorganization. For example, Fuerst found that McFarland was too much of a "nice guy" for the supervisor position, and thus failed to identify and rectify poor employee performances; that Rainey was reluctant to make necessary supervisory decisions and was not respected by many of his agents; that Stafford was "aloof" and "dictatorial" with agents and was slow in providing constructive feedback to them in his role as sales effectiveness coordinator; that Hedley, whose major responsibility was to motivate agents to achieve attendance goals, had failed to do so; and that Serpe would be unable to supervise capably an expanded number of agents. Also, Hedley and Stafford had not directly supervised a team of sales agents in over a year. During the time plaintiffs were supervised by Fuerst and prior to their demotions, Fuerst had advised each plaintiff of his concerns and reservations about their work performance, and each plaintiff had adequate knowledge of Fuerst's assessment.

When Fuerst, Spooner, and Bergs met in December, 1976 to merge Fuerst's and Spooner's rankings into a rank ordering of all twenty Los Angeles supervisors, no one in the Los Angeles office was told to demote any particular supervisor. The ultimate determination of who would be demoted was based upon the number of Supervisors, Reservations that Marketing had indicated could be retained in Los Angeles and the supervisor's ranking, although Marketing had initially slotted the Los Angeles office for eleven supervisors. Seven supervisors were demoted to coordinator positions, one supervisor was promoted to acting manager, and ten reservations sales agents were promoted to coordinators in the Los Angeles office pursuant to the January 1977 reorganization.

In December, 1976, Fuerst was advised that he could retain all but six of his supervisors, and therefore the plaintiffs and Marcella Blackwell were slated for demotion to coordinator positions. Blackwell was retained as a supervisor, however, when Robert Von Gorres voluntarily requested a demotion to coordinator for health reasons. Len O'Brien was the only demotion among Spooner's supervisors.

Table VIII illustrates the impact of the January 1977 reorganization on the twenty Los Angeles supervisors. This table includes the employees' dates of birth, ages and month salaries as of the reorganization.

5. Defendant's Subsequent Failure to Promote Plaintiffs.

Supervisor vacancies are generally filled from within TWA. In filing supervisor vacancies arising in TWA's Los Angeles office following the reorganization, the office managers evaluated the PER-288 forms submitted by interested applicants, and decided which candidates were to be interviewed. Interviews were generally conducted by a team of

managers, including the manager to whom the position reported. After all interviews were completed, the interviewing team decided which candidate, if any, was to be accepted.

In addition to the various instances in which plaintiffs applied for TWA supervisor vacancies, to which occurrences the parties stipulated (*see* pp. 11-12, *supra*), plaintiffs introduced evidence showing that in April, 1981, plaintiffs Hedley, McFarland and Rainey unsuccessfully applied for one supervisor vacancy in response to JOA 81-512. None of the other plaintiffs applied for the vacancy. They were interviewed by a panel comprised of Denny Fuerst and Vera Reichardt. Applicant Inga Orebo (age 44) was selected. Shortly after Orebo's selection and in June 1981, another supervisor vacancy was created due to a supervisor's death. George Paine (age 46), who had been the runner-up applicant to Orebo, was selected to fill this new vacancy.

As heretofore noted, this action taken with respect to plaintiffs, and to all others, either to demote, promote or not to promote, was taken according to prescribed company procedures and was, in most instances, the joint decision of several management persons.

6. Plaintiffs' Critique of Defendant's Employee Evaluation Procedures.

The Court has reviewed extensively and considered intensively the evidence proffered by plaintiffs regarding the defendant's policies, procedures and methods for promotions and demotions. It was so-called expert or opinion testimony. The evidence, if taken as first presented on direct examination, constitutes a harsh criticism of the validity of defendant's procedures. If so taken, it would constitute the only credible evidence in support of plaintiffs' case. But it cannot be so taken. Probing questions put other than on direct interrogation disclosed the testimony as that of a biased

refugee from the halls of academia who constructed a presentation distorted from reality and intended to deceive. The hypotheses and assumptions upon which the expert, Dr. Driver, predicated his opinion were clearly erroneous. He suggested that the only validated rankings or ratings for promotion were the objective statistics on bookings of flights, hotels and autos.

On direct interrogation in this regard, he compared certain results achieved by employees under plaintiffs' direction with the results of others. It appeared that the doctor had thereby made a case for the plaintiffs. But later interrogation disclosed that variables were present in the statistics for which no adjustments had been made. For example, some bookings were achieved by a team working a day shift and others, which had to suffer comparison, were achieved in a swing or night shift.

Beyond this, mirabile dictu, the expert conceded with obvious reluctance that he had made no adjustment, either in his statistics on bookings or in his opinion, for the expert conceded with obvious reluctance an important difference in team member numbers between 12 and 29; "it was rather marginal." Also, the Court was doubtful of the accuracy and dependability of the statistics extrapolated by one of the plaintiffs and upon which the expert relied as an "objective" basis for his opinion.

A further unmasking of this expert's bias appeared in his so-called statistical analysis of the post-reorganization history of the original 20 supervisors, some of whom were retained as supervisors and some of whom, including plaintiffs, were demoted. On the figures postulated (which were accurate), the professor opined that there was a 99 to 1 chance that age was a factor in defendant's actions regarding these persons. The Court finds this conclusion wholly unsupported and rejects it. Even the professor seemed to rec-

ognize his confusion when he acknowledged the significance of the figures, not to reflect a 99 to 1 *age* motivation but rather that there was one chance in about a hundred that a *random* phenomenon has occurred. The Court is at a loss to understand how any professor of any credibility could expect to confuse and convince any fact finder with that sort of flim flam.

This Memorandum of Decision and order shall constitute the findings of fact and conclusions of law of the Court. Perhaps none need have been made because, at the close of the evidence, when its conclusions were very clearly in mind, the Court announced from the bench the following:

THE COURT: Well, the Court has some comments to make at this time in connection with the case.

It's a case of enormous simplicity. It's simple as to the claims made, the issues raised, the defense tendered, and it is simple as to the evidence in the case. It's a classic example of a case in which there was proffered for trial by the pretrial documents, particularly the pretrial conference order, as a case of great scope and length, substantial scope and length in any event. And it proceeded to trial on that basis. And it took approximately two trial weeks to reach this stage. And in the course of presenting the case, there was great time and effort expended in respect to matters which are clearly not even in issue factually. The factual dispute tendered in this case is capable of being very simply stated.

Whether the plaintiffs' change of position from management supervisor reservations to non-management team coordinators in January, 1977 was motivated by considerations of age, or as another way of putting it, by age discrimination and, further, whether there continued after the January, 1977 reorganization a motivation on the part of the defendant

toward these plaintiffs of age discrimination?

On the liability issue that is what is presented for the Court, very simply stated, because it is an issue capable of being simply stated.

Now, the Court finds that there is not one shred of competent credible evidence, direct evidence, that the defendant engaged in any way toward these plaintiffs on the basis of age discrimination motivation.

The plaintiffs make what could be characterized as a statistical inferential case, supplemented by something other than the statistics, and that is, a contention that the whole gamut of the procedures by which these plaintiffs were demoted, or not promoted, or both, was unreliable and invalid.

And it seems to the Court that what this really adds up to is this: that the day may arrive when some high degree of scientific and theoretical perfection is commonly known and utilized by corporations and other business activities in the conduct of all of their affairs, including the hiring and firing and promoting and demoting. That day has not yet arrived. And it certainly had not arrived at the time when the occurrences involved here took place.

But even if it had, TWA is not held to any standard under the Age Discrimination Employment Act to perform to that level.

The test is whether the evidence established that what was done to, with and about these plaintiffs, about which they complain, was done with age as a determining factor, which is understood to mean a number of things.

Whether what was done or not done was significantly contributed to by age as a factor.

Now, in the absence of any direct evidence, and the Court emphatically finds that there is no direct evidence of age

discrimination on the part of the defendant in connection with the issues here presented, the Court must then look to the circumstantial or indirect evidence.

And the plaintiffs would have the Court find a prima facie case on the basis of expert testimony given by two experts as to whether, as a matter of statistical analysis, these things of which complaint is made occurred or indeed could have occurred other than by age discrimination.

The Court finds that approach, for a number of reasons, not very persuasive.

First, the samples here involved are such as not to afford a persuasive basis and, indeed, it develops that the statistical analysis would suggest that there might well have been numbers of other factors besides age, but of a similar character, that might have entered into the determinations.

Dr. Driver, for example, made extensive reference to Exhibits 48, 49 and 51, and he expressed the opinion that on the record made here, so far as it was recited to him as a hypothesis, that the action taken with respect to these plaintiffs, and the other supervisors, was inversely related to the objective and demonstrable performance records, respectively.

The common rule of law with respect to expert testimony is put in two different ways. There is, for example, in the Evidence Code a rule of evidence, being Rule 702, and it reads as follows:

> "If scientific, technical or other specialized knowledge would assist the trier of fact to understand the evidence, or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

The Court entertained grave doubt when the so-called expert testimony was proffered that it was the kind of ev-

idence contemplated by Rule 702, that is, as to whether it was that kind of scientific or technical or other specified specialized knowledge that would assist the trier of fact.

Nevertheless, all of the proffered testimony, with almost no exception — and there were a couple of exceptions which were excluded, but not significantly so — were permitted to be given by the plaintiffs' experts.

But there is a further rule of law, even if that expert opinion evidence fell within the areas which are deemed at least desirable to assist the trier of fact, that, nevertheless, if the expert's reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, that the opinion evidence may be disregarded entirely.

Now, the Court doesn't disregard it entirely but, for example, with respect to the reliance by the witness on Exhibit 49, and the data therein set forth and, similarly, with respect to Exhibits 50 and 51, the Court finds that there was such failure of inquiry, or evaluation, by the expert, Driver, with respect thereto, as to minimize, at the very least, his opinion, and the Court, as the finder of fact finds that there were deficiencies in the assumed factual hypotheticals put to Dr. Driver sufficient to, if not invalidate the opinion, certainly to minimize it substantially.

Now, what this really adds up to is this: that the direct testimony of Mr. Fuerst, by that is meant all of his testimony elicited on direct as an adverse witness, on cross thereafter, and on direct called by the defendant, insofar as it made unqualified recitals, must either be deemed perjurious or so suspect on the ground that he doesn't recognize the truth when he sees it, even though he does not willfully misstate, either one or the other of those must be adopted in order to establish that there was as a matter of direct evidence any consideration of age, young or old, involved in the demo-

tions as they are called or the nonpromotions of these plaintiffs. And as previously indicated, weighed against that direct evidence, and there was other direct evidence by those who participated in the demotion and promotion process to the same effect, and each of which must either be deemed perjurious or as coming from a person unable to recognize the truth when he sees it, balanced against, as said by the Court previously, the proffered inferential, indirect, circumstantial evidence of the so-called experts.

Now, one thing appears in this case with compelling significance and deep feeling on the part of the Court. For example, as Dr. Driver said, we all entertain biases and prejudices and attitudes and beliefs, predispositions, and views, and the like, it's human nature so to do, that it isn't easy to exterminate totally those things from one's mind or one's processes or procedures. And what emerges so as to promote the feeling on the part of the Court is that these plaintiffs are, indeed, totally sincere. They are sincere in their beliefs, and they entertain deeply and strongly and within reason the views that they were loyal, competent, and effective employees of TWA. And it's understandable that they believe as they did, and as each of them told the Court, they believed that they were unfairly treated and that they deserve more than the others to be promoted or at least not demoted. There is not the slightest doubt as the Court finds of the sincere belief on the part of each one that this is so.

They were given some encouragement to believe that their position was sound in law, and they pursued this lawsuit consequently. But the Court finds that those attitudes, however sincerely entertained, and those beliefs, however sincerely held, were the product of even greater emotional bias, and that much of the explanation of what's here involved stems from that.

In the absence of Mr. Fuerst or others who participated in the reorganization and the promotions thereafter being under instructions or directions or the belief that the corporate policy was as contended by the plaintiffs, there is only one possible basis upon which it could be successfully contended that what Mr. Fuerst did was to indulge toward these plaintiffs discrimination based on age, and that is that he was the kind of person generally referred to by Dr. Driver as unable to perceive in the procedures he used by way of interview and evaluation the prejudices contended by the plaintiff he had toward those 40 and over, and that despite his vehement denial of those prejudices or biases existed, that the Court must find that they did. The Court does not so find. And the Court does find that to whatever extent it was known or as a belief entertained by the defendant through its agents, including Mr. Fuerst, that these plaintiffs were older than others were or that there was any age differentiation, that to whatever extent it was present, it fell far short of being the determining factor or even a significant factor, if at all."

All of the foregoing is now readopted by the Court.

In its discretion the Court declines to award attorneys' fees to the defendant as the prevailing party.

Let judgment be entered in favor of defendant and against plaintiffs.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: March 31, 1982.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

TABLE I

Artz	—	$1700
Guerra	—	$1591
Stafford	—	$1590
Van Gorres	—	$1600
Davila	—	$1595
Strauch	—	$1595
Catalan	—	$1580
Serpe	—	$1485
Hedley	—	$1485
Blackwell	—	$1485
Ewing	—	$1485
Garfield	—	$1485
Grabowski	—	$1485
McFarland	—	$1485
Trenkle	—	$1485
Rainey	—	$1485

TABLE II

The following Supervisors, Reservations changed position or retired following the reorganization, but not necessarily as a part thereof:

NAME	CHANGE	EFFECTIVE DATE
L. O'Brien	Team Coordinator	1/31/77
F. Serpe	Team Coordinator	2/21/77
H. McFarland	Team Coordinator	2/21/77
A. Rainey, Jr.	Team Coordinator	2/21/77
M. Hedley	Team Coordinator	2/21/77
F. Stafford	Team Coordinator	2/21/77
Robert Von Gorres	Team Coordinator	3/14/77
P. Lanum	Acting Manager/ Reservations Service & Administration	1/17/77
I. Sutter	Retired	2/1/78

TABLE III

NAME	DATE OF BIRTH	SUPERVISOR AFTER REORGANI-ZATION	TWA JOB HISTORY FROM	TO	
Artz, Gordon	8/16/26	Yes	8/45	1/56	Cargo Agent, Transportation Agent, Ticket Agent, Lead Agent Rsvs *ICT*
			1/56	9/62	Chief-Rsvns Sales *TUL*
			9/62	11/67	Grp Supv Svcs *STL*
			11/67	10/72	Grp Supv Tele Sales *ABQ*
			10/72	12/80	Supv Cust Svs-Rsvns *LAX*
Blackwell, Marcella	5/10/42	Yes	6/67	9/68	Res Salesperson-Dom *PIT*
			9/68	9/73	Res Salesperson -Intl *PIT*
			9/73	3/76	Sr Res Salesperson -SKY *LAX*
			3/76	7/77	Supv Cust Svcs -Rsvns *LAX*
			7/77	9/79	Employee Relations Rep-Prsnl (Furloughed) *LAX*
Carnes (McIntyre) Diane	02/05/41	Yes	05/63	10/65	Teletype Operator-Rsvns *ABQ*
			08/66	08/76	Rsvns Sales Agent (In addition worked on groups, tours & prepaids, ticketing & intl rate desk & ABQ relief CSA.) *LAX*
			08/76	11/77	Supv Cust Svcs-Rsvns *LAX*
			11/77	12/80	Field Mgr Psgr Svcs *LAX*
Catalan, Neotha	06/27/43	Yes	09/71	09/74	Rsvns Sales Agent *LAX*
			09/74	12/80	Supv Cust Svcs-Rsvns *LAX*

NAME	DATE OF BIRTH	SUPERVISOR AFTER REORGANI-ZATION	TWA JOB HISTORY FROM	TO		
Davila, Helen	01/05/26	Yes	03/62	05/66	Rsvns Sales Agent	*LAX*
			05/66	12/69	Lead Rsvns Sales Agent	*LAX*
			12/69	04/74	Rsvns Chief Sales & Svcs	*LAX*
			04/74	04/79	Supv Cust Svcs-Rsvns	*LAX*
			04/79	12/80	Team Coordinator Rsvns	*LAX*
Ewing, James	04/25/47	Yes	08/72	12/72	Cust Service Agent	*PIT*
			12/72	06/73	Quality Controller	*MKC*
			06/73	08/74	Sr Analyst	*STL*
			08/74	04/75	Quality Controller	*STL*
			04/75	08/76	Rsvns Sales Agent	*STL*
			08/76	03/79	Supv Cust Svcs-Rsvns	*LAX*
			03/79	12/80	Mgr Accts Tele Sales	*CHI*
Garfield, Randy	4/25/52	Yes	01/73	09/74	Rsvns Sales Agent	*LAX*
			09/74	04/75	Quality Controller	*LAX*
			04/75	05/75	Furlough	
			05/75	09/75	Rsvns Sales Agent	*LAX*
			09/75	01/78	Supv Cust Svcs-Rsvns	*LAX*
			01/78	04/79	Supv Rsvns Svcs	*MKC*
			04/79	12/80	Account Mgr Sales	*MKC*

NAME	DATE OF BIRTH	SUPERVISOR AFTER REORGANIZATION	TWA JOB HISTORY FROM	TO		
Grabowski, Gregory	3/28/49	Yes	07/68	06/69	Rsvns Sales Agent	*ABQ*
			06/69	06/73	Military Leave	
			06/73	03/76	Rsvns Sales Agent	*LAX*
			03/76	12/80	Supv Cust Svcs-Rsvns	*LAX*
Guerra, Shiela	12/23/42	Yes	09/65	09/67	Rsvns Sales Agent	*LAX*
			03/67	12/69	Lead Agent-Telemail	*LAX*
			12/69	05/77	Supv Cust Svcs-Rsvns	*LAX*
			05/77	01/79	Field Mgr	*TUL*
			01/79	12/80	CSA	*TUL*
O'Brien, Len	03/28/20	No	05/50	06/52	Transportation Agent	*LTR*
			06/52	06/60	Reservations Agent	*RDG*
			06/60	02/61	Rsvns Agent in charge	*RDG*
			02/61	04/64	Reservations Agent	*PHX*
			04/64	12/69	Lead Rsvns Agent	*PHX*
			12/69	02/71	Chief Rsvns Services	*PHX*
			02/71	05/72	Senior Rsvns Agent	*LAX*
			05/72	05/74	Chief, Psgr Rsvns Sales & Service	*LAX*
			06/74	01/77	Supervisor, Customer Svcs Rsvns	*LAX*
			01/77	12/80	Team Coordinator	*LAX*

NAME	DATE OF BIRTH	SUPERVISOR AFTER REORGANI-ZATION	TWA JOB HISTORY FROM	TO		
Strauch, Robert	01/29/26	Yes	03/65	06/72	Transportation Agent	*LAX*
			06/72	04/74	Chief Tele Sales-Rsvns	*LAX*
			04/74	12/80	Supv Cust Svcs-Rsvns	*LAX*
Sutter, Irv	10/22/20	Yes	04/47	09/47	Rsvns Sales Agent	*MKC*
			09/47	04/52	System Rsvns Agent	*MKC*
			04/52	08/52	Rsvns Agent	*ABQ*
			08/52	04/58	Rsvns Agent-In-Chg	*ABQ*
			04/58	03/60	Lead Rsvns Agent	*ABQ*
			03/60	04/63	Chf Ticket Sls Agt	*SAN*
			04/63	06/63	Lead Ticket Sls Agt	*SAN*
			06/63	07/72	Rsvns Chf Telph Sls	*LAX*
			07/72	06/74	Chf Psgnr Rsvns Sls	*LAX*
			06/74	01/78	Supvr-Cust Svs Rsvns	*LAX*
			Retired			
Von Gorres, Robert	4/23/40	No	05/64	05/64	Rsvns Trainee	*LAX*
			05/64	08/68	Rsvns Sls Agt P/T	*LAX*
			08/68	08/69	Rsvns Sls Agt F/T	*LAX*
			08/69	04/75	Sr Rsvns Sls Agtr F/T	*LAX*
			4/75	3/77	Suprv-Cust Svcs Rsvns	*LAX*

NAME	DATE OF BIRTH	SUPERVISOR AFTER REORGANI-ZATION	TWA JOB HISTORY FROM	TO		
			3/77	9/78	Team Coord -Rsvns	*LAX*
			9/78	12/80	Suprv-Cust Svcs Rsvns	*LAX*

TABLE IV

NAME	DATE OF BIRTH	TWA JOB HISTORY FROM	TO		
Hall, W. Ken	6/13/43	2/26	4/69	Transp Agent P/T	*PHX*
		4/69	12/70	Cust Svc Agent F/T	*PHX*
		12/70	7/71	Furloughed	*PHX*
		7/71	2/72	Quality Control	*PHX*
		2/72	1/73	Quality Control	*LAX*
		1/73	6/74	Chief Passenger Svcs	*LAX*
		6/74	2/76	Supv-Cust Rel Rsvns	*LAX*
		2/76	2/77	Budget & Cost Admin	*LAX*
		2/77	11/77	Mgr-Rsvns Plng & ctrl	*LAX*
		11/77	8/78	Supv-Cust Svc Rsvns	*LAX*
		8/78	10/78	Mgr-On Duty Airp Svcs	*LAX*
		10/78	7/80	Mgr-Passenger Svcs	*LAX*
		Resigned			
Reichardt, Vera	2/15/35	3/59	5/59	Rsvns Sls Agent P/T	*LAX*
		5/59	11/59	Rsvns Sls Agt F/T SSNL	*LAX*
		11/59	4/74	Rsvns Sls Agt F/T Perm	*LAX*
		4/74	2/77	Sr Rsvns Sls Agt	*LAX*
		2/77	11/77	Team Coord-Rsvns	*LAX*
		11/77	11/80	Supvr-Cust Svc Rsvns	*LAX*
		11/80	12/80	Acting Mgr-Agency & Comm Sls	*LAX*
Ahearn, Neil	6/24/44	5/65	6/65	Rsvns Trainee	*BOS*
		6/65	11/71	Rsvns Sales Agent	*BOS*
		11/71	11/72	Rsvns Sales Agent	*MKC*
		11/72	2/77	Rsvns Sales Agent	*LAX*
		2/77	11/77	Rsvns Team Coord	*LAX*
		11/77	3/79	Supv-Cust Rel Rsvns	*LAX*
		3/79	12/80	Field Mgr-Grnd Svcs	*LAX*
Scott, Lucy	1/30/40	4/67	5/67	Rsvns Trainee	*PHL*
		5/67	1/68	Rsvns Sales Agnt P/T	*PHL*

NAME	DATE OF BIRTH	TWA JOB HISTORY FROM	TO		
		1/68	11/74	Rsvns Sls Agt F/T	*PHL*
		11/74	4/75	Sr Rsvns Sls Agt F/T	*PHL*
		4/75	5/76	Supvr-Cust Svc Rsvns	*PHL*
		5/76	5/77	Sr Analyst	*MKC*
		5/77	11/77	Supv Rsvns Poc	*MKC*
		11/77	12/80	Supvr-Cust Svs Rsvns	*LAX*

TABLE V

NAME	DATE OF BIRTH	TWA JOB HISTORY FROM	TO		
Shepherd, Susan	1/26/45	3/63	6/63	Rsvns Trainee	*STL*
		6/63	9/65	Rsvns Sls Agt P/T	*STL*
		9/65	3/66	Rsvns Sls Agt F/T	*LAX*
		3/66	6/66	Maternity Leave	
		6/66	8/69	Rsvns Sls Agt F/T	*LAX*
		8/69	2/77	Sr Rsvns Sls Agt F/T	*LAX*
		2/77	6/78	Rsvns Team Coordinator	*LAX*
		6/78	12/80	Supv-Services	*LAX*

TABLE VI

NAME	DATE OF BIRTH	TWA JOB HISTORY FROM	TO		
Von Gorres, Robert	4/23/40	5/64	5/64	Rsvns Trainee	*LAX*
		5/64	8/68	Rsvns Sls Agt P/T	*LAX*
		8/68	8/69	Rsvns Sls Agt F/T	*LAX*
		8/69	4/75	Sr Rsvns Sls Agt F/T	*LAX*
		4/75	3/77	Supvr-Cust Svcs Rsvns	*LAX*
		3/77	9/78	Team Coord-Rsvns	*LAX*
		9/78	12/80	Supv-Cust Svcs Rsvns	*LAX*

TABLE VII

NAME	DATE OF BIRTH	TWA JOB HISTORY FROM	TO		
Geraths, Nancy	9/24/53	2/77	5/77	Rsvns Sls Agt P/T	*LAX*
		5/77	8/77	Rsvns Sls Agt F/T	*LAX*
		8/77	6/78	Rsvns Sls Agt P/T	*LAX*
		6/78	3/79	Rsvns Sls Agt F/T	*LAX*
		3/79	Pres.	Supv-Cust Rel Rsvns	*LAX*
Underwood, Kathleen	4/14/48	4/68	5/68	Rsvns Trainee	*LAX*
		5/68	1/72	Rsvns Sls Agt F/T	*LAX*
		1/72	3/72	Furloughed	
		3/72	2/77	Rsvns Sls Agt F/T	*LAX*
		2/77	3/79	Team Coord-Rsvns	*LAX*
		3/79	10/79	Supv-Cust Svcs Rsvns	*LAX*
		10/79	12/80	Team Coord-Rsvns	*LAX*
Lefstad, Dean	1/17/45	5/65	6/65	Rsvns Trainee	*LAX*
		6/65	11/65	Rsvns Sls Agt P/T	*LAX*
		11/65	9/67	Military Leave	
		9/67	9/68	Rsvns Sls Agt P/T	*LAX*
		9/68	1/69	Rsvns Sls Agt F/T	*LAX*
		1/69	6/72	Rsvns Sls Agt P/T	*LAX*
		6/72	2/77	Rsvns Sls Agt F/T	*LAX*
		2/77	3/79	Team Coord-Rsvns	*LAX*
		3/79	12/80	Supv-Cust Svcs Rsvns	*LAX*
Adams, Carolyn	6/27/49	2/76	6/76	Rsvns Sls Agt P/T	*NYC*
		6/76	8/77	Rsvns Sls Agt F/T	*NYC*
		8/77	9/78	Team Coord-Rsvns	*NYC*
		9/78	3/79	Passgr Relations Rep	*LGA*
		3/79	12/80	Supvr-Cust Rel Rsvns	*LAX*

TABLE VIII

NAME	DATE OF BIRTH	Age at 1/1/77	Position After Reorganization	Salary
1. O'Brien	3/28/20	56	Reference Material Clerk	1485
2. Sutter	10/22/20	56	Supervisor	1610
3. Lanum	4/3/21	55	Acting Manager/ Reservations Services & Administration	1710
4. Davila	5/5/26	50	Supervisor	1595
5. Strauch	1/29/26	50	Supervisor	1595
6. Artz	8/16/26	50	Supervisor	1700
7. Hedley*	10/26/27	49	Manpower Coordinator	1485
8. Serpe*	2/3/28	48	Team Coordinator	1485
9. Stafford*	3/19/29	47	Team Coordinator	1590
10. Rainey*	5/7/33	43	Team Coordinator	1485
11. McFarland*	9/27/35	41	Team Coordinator	1485
12. Von Gorres	4/23/40	36	Team Coordinator	1600
13. Carnes	2/5/41	36	Supervisor	1485
14. Trenkle	5/2/42	34	Supervisor	1485
15. Blackwell	5/10/42	34	Supervisor	1485
16. Guerra	12/23/42	34	Supervisor	1591
17. Catalan	6/27/43	33	Supervisor	1580
18. Ewing	4/25/47	29	Supervisor	1485
19. Grabowski	3/28/49	27	Supervisor	1485
20. Garfield	4/25/52	24	Supervisor	1485

*Plaintiffs

APPENDIX C.

Federal Rules of Civil Procedure.

Rules 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association

or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained

from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

(a) M. ion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response

to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in

relation to the motion among the parties and persons in a just manner.

U.S. Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 83-40

IN THE

Supreme Court of the United States

October Term, 1983

MARY HEDLEY, HERB MCFARLAND, ASBERRY RAINEY, JR., FRANK SERPE and FRANK STAFFORD,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION FOR RESPONDENT TRANS WORLD AIRLINES, INC.

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Questions Presented.

A. Was the district court's refusal to permit certain burdensome worldwide discovery by plaintiffs a proper exercise of its discretion?

B. Is there a conflict among the Courts of Appeals regarding the standard for abuse of discretion by trial judges in discovery matters?

C. Was it an abuse of discretion for the trial judge to discredit statistical evidence derived from a sample size of twenty?

D. Were petitioners denied due process under the United States Constitution because the trial judge allegedly referred during the trial to a statistics treatise not introduced in evidence?

List of Trans World Airlines, Inc.'s Parent Company and Subsidiaries.

Parent Company: TRANS WORLD CORPORATION ("TWC").

Subsidiaries of TWC:

Trans World Airlines, Inc. ("TWA") (81.34% Ownership);
Hilton International (100% Ownership);
Canteen Corporation (100% Ownership);
Century 21 (100% Ownership); and
Spartan Food Systems (100% Ownership).

Subsidiaries of TWA:

None.

TABLE OF CONTENTS

APPENDIX A.

TABLE OF AUTHORITIES

Federal Statute

Federal Rules

No. 83-40

IN THE

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BRIEF IN OPPOSITION FOR RESPONDENT TRANS WORLD AIRLINES, INC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Trans World Airlines (hereinafter referred to as "TWA"), submits the following brief in opposition to the Petition for a Writ of Certiorari filed by Mary Hedley, Herb McFarland, Asberry Rainey, Jr., Frank Serpe and Frank Stafford (hereinafter referred to as "plaintiffs").

Statement of the Case.

On April 8, 1982, the United States District Court, Central District of California, following an eight-day trial without a jury, held that TWA did not discriminate against

plaintiffs in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (hereinafter referred to as the "ADEA"), by reassigning them from management to non-management positions pursuant to a January 1977 reorganization within TWA's Los Angeles reservations office, and thereafter by refusing to promote them. Plaintiffs' motion for a new trial was denied, and on May 16, 1983, the United States Court of Appeals for the Ninth Circuit unanimously affirmed the district court's decision. In the Petition for a Writ of Certiorari herein, plaintiffs seek review by this Court on three principal grounds.

First, plaintiffs claim that the district court's discretionary denial of burdensome worldwide discovery denied them an adequate opportunity to prove their case, and was contrary to this Court's discovery decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). (Pet., pp. 5-9.) Second, plaintiffs claim that the district court improperly discredited their statistical experts' testimony because it was derived from a sample size of twenty. (Pet., pp. 10-12.) Finally, they argue that the district court's alleged reference during the trial to a statistics treatise not introduced in evidence denied them due process. (Pet., pp. 13-15.)

As demonstrated below, the lower courts fully considered and correctly decided the issues herein. In any event, the petition does not present an important question of federal law upon which there are conflicting decisions by the Courts of Appeals, or which should be decided by this Court. Accordingly, this Court should dismiss the petition and let the lower courts' well reasoned judgments stand.

Statement of Additional Facts.

The initial issue raised by the petition centers around plaintiffs' first set of interrogatories. They were served on August 16, 1979, and contained fourteen interrogatories.

TWA responded to all fourteen interrogatories, but gave limited answers in accordance with stated objections to three interrogatories. (ER 56, 76-80; SER 263-66.)[1] The contested interrogatories sought to discover *all* complaints of age discrimination filed against TWA since 1967 with administrative agencies, in courts, and those presented to TWA by union representatives. TWA objected because, in the context of a non-class action, those interrogatories were burdensome, irrelevant and not likely to lead to the discovery of relevant evidence in that they: (1) sought information relating to complaints filed against TWA on a worldwide basis rather than solely for the Los Angeles reservations office where plaintiffs were employed and where the alleged discriminatory acts occurred; (2) sought information regarding complaints presented by union representatives even though plaintiffs were neither union members nor represented by a union; and (3) sought information about complaints filed in a twelve year period from 1967 to 1979 even though the alleged discriminatory acts began in 1977. TWA answered those three interrogatories by providing the requested information for its Los Angeles reservations office only and for the four-year period prior to the January 1977 reorganization.

Plaintiffs moved to compel further answers to the contested interrogatories. In support of its opposition brief, TWA presented uncontroverted declaration testimony demonstrating the irrelevance and undue burden of these interrogatories. Thus, TWA showed that it is a worldwide air carrier with over 50 domestic and 100 worldwide facilities,

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[1]All references to "ER" and "SER" refer to portions of documents in the Excerpt of Record and Supplemental Excerpt of Record filed with the United States Court of Appeals for the Ninth Circuit. Similar references are used throughout this brief, and the pages referred to are attached hereto as Appendix A.

and that it employed approximately 40,000 people. It was shown that TWA's reservations sales office employees, including plaintiffs, were not and had never been unionized. TWA also established that in order to obtain the requested information, all of its employees' personnel files would have to be searched, and that it would require the full-time effort of three employees for one month to complete this task. (ER 83-85.)

On November 19, 1979, the district court issued its order denying plaintiffs' motion to compel on the ground that the interrogatories were "burdensome and that the plaintiffs [have] made an insufficient showing that the information requested therein is relevant or likely to lead to the discovery of relevant evidence." (ER 93.) The Ninth Circuit affirmed this order, finding that plaintiffs "have failed to show that the court's decision was based on a clear error of judgment." (Pet., App. A, p. 1.)

Plaintiffs' unsuccessful attempt at trial to prove their case through statistical evidence is the basis for the remainder of their petition. The district court found that their two experts' statistical testimony was biased and "not very persuasive." (Pet., App. B, pp. 15, 20, 24.) The district court also concluded that their testimony "fell on its own weight" (SER 9-10), and that "there is not one shred of competent credible evidence, direct evidence, that the defendant engaged in any way toward these plaintiffs on the basis of age discrimination motivation." (Pet., App. B, p. 23.)

On appeal, the Ninth Circuit rejected plaintiffs' argument that the district court erred in giving the testimony of their statistical experts little weight. The Ninth Circuit stated that:

> "The [district] court was entitled to conclude that statistical evidence derived from an extremely small universe has little predictive value. . . . More fundamentally, the trial court is in the best position to appraise

the credibility of witnesses. . . .

"Even if we assume the court's finding was clearly erroneous, it was harmless error, because appellants failed to prove that age was a 'determining factor' in TWA's actions, . . . or to demonstrate that TWA's articulated legitimate business reasons were pretextual." (Footnotes and citations omitted.) (Pet., App. A, p. 2.)

ARGUMENT.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. The District Court's Discovery Order Was Neither an Abuse of Discretion nor Inconsistent With This Court's Decision in Hickman v. Taylor, and There Is No Conflict Among the Circuits With Respect to Discovery.

In challenging the district court's discovery order, plaintiffs strain to argue to this Court that the order is symptomatic of the erosion of the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), by allegedly conflicting lower court decisions, and that the order denied them an adequate opportunity to prove age discrimination. Both of these untenable arguments are grounded upon a faulty premise — that there are no limits to the scope of discovery. As illustrated below, however, issues of relevancy and burden affect the scope of discovery. Regarding plaintiffs' proposition that there exists a split in the Courts of Appeals on the standard for abuse of discretion by trial judges in discovery matters, the petition cites no supporting cases.[2]

The Federal Rules of Civil Procedure and the decision in *Hickman v. Taylor* justify the limits on discovery ordered herein. Rule 26(b)(1) limits discovery to matters "relevant to the subject matter," and Rule 26(c) provides that a court may make a protective order "which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the

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[2]The cases in the treatise's footnote which plaintiffs cite as evidence of a conflict in the circuit courts (*see* Pet., p. 6), merely illustrate that faithful application of the *Hickman* rationale will result in either a granting or denial of discovery depending upon the facts of each case. None of those cases cast doubt upon the viability of the *Hickman* decision or the consistency of its application by the circuit courts.

following: (1) that the discovery not be had . . ." In *Hickman*, this Court stated that "discovery, like all matters of procedure, has ultimate and necessary boundaries." 329 U.S. at 507.

In the instant case, plaintiffs stipulated that TWA had legitimate business reasons for the reorganization (*see* Pet., App. B, pp. 7-8), and they have conceded that the allegedly discriminatory reorganization employment decisions were made by Los Angeles reservations office managers. (Pet., p. 3.) It is well settled that "in the context of investigating an individual complaint [of employment discrimination], the most natural focus is upon the source of the complained of discrimination — the employing unit or work unit." *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978). *See also Hinton v. Entex, Inc.*, 93 F.R.D. 336, 337 (E.D. Tex. 1981) (discovery limited to facility where plaintiff employed); *EEOC v. Prestolite Battery Div. of Eltra Corp.*, 14 F.E.P. Cases 1634, 1636 (W.D. Okla. 1976) (same).

Likewise, the limitation of plaintiffs' discovery to a four year period prior to the alleged discriminatory acts is consistent with the reasoning of *Hickman* and the discovery rules. *See, e.g., James v. Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979) (discovery limited to a four year period); *Ochoa v. Monsanto Co.*, 473 F.2d 318, 319 (5th Cir. 1973) (per curiam) (discovery limited to six months before and after employment interview); *EEOC v. Magnetics Div. of Spang Industries*, 13 F.E.P. Cases 191, 191-92 (W.D. Pa. 1976) (discovery limited to 3½ years prior to the alleged discriminatory act).

Plaintiffs assert that by not obtaining and then introducing in evidence information about other charges or lawsuits against TWA alleging age discrimination, they were denied an adequate opportunity to prove their case. This assertion

is both wrong and patently misleading. Completely unrelated age discrimination charges or lawsuits against TWA since the ADEA's enactment arising out of employment actions unrelated to the January 1977 reorganization in other facilities by other managers would not have constituted competent evidence in this case. Plaintiffs cannot credibly argue that they were prejudiced by the order limiting their discovery in the first instance to the facility where they were employed and where all the employment decisions were made, and to a period four years prior to the alleged discriminatory acts. This point is underscored by the fact that although plaintiffs' motion to compel was denied early in the litigation (*i.e.*, 11 months after the filing of the complaint and 3 months after plaintiffs began discovery), they did not later attempt to justify a broadening of their discovery by showing or claiming nationwide discrimination.

In sum, contrary to plaintiffs' assertion (*see* Pet., p. 9), this is not a case where a "full and fair opportunity" to prove a violation of the ADEA was denied, and viewed reasonably, the district court's discovery order played an insignificant role in this case.

B. The Trial Court's Finding That Plaintiffs' Statistical Evidence Was Unpersuasive Was Not an Abuse of Discretion, and Does Not Present an Important Question of Federal Law.

It is well established under federal law that where the credibility of witnesses, including experts, is involved and the trial court has had an opportunity to observe and judge that credibility, the court's evidentiary evaluations should not be overturned unless clearly erroneous. *See* Fed. R. Civ. P. 52(a); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982); *United States v. Smith*, 625 F.2d 278, 279-

80 (9th Cir. 1980). Applying the "clearly erroneous" standard, the Ninth Circuit affirmed the district court's findings regarding plaintiffs' experts' testimony. In their attempt to present a question of federal law for review in the face of this case authority, plaintiffs make arguments which mischaracterize the district court's decision and misconstrue the role of experts.

First, plaintiffs argue that because their two experts' statistical testimony was not countered by an expert for TWA, the district court was obliged to accept the experts' opinions (*i.e.* enter judgment for plaintiffs). Plaintiffs' experts' field of knowledge is statistics, not the ultimate issue of whether age discrimination occurred. Further, the mere fact that TWA did not call an expert did not make plaintiffs' experts credible. Indeed, the district court after observing the testimony of Drs. Pfeffer and Driver, concluded that it "fell of its own weight." (SER 9-10.)

For example, Dr. Pfeffer admitted that if the supervisors selected for demotion were analyzed based on the criteria of height or weight or color by applying the same statistical test he utilized when he examined the reorganization for age bias, virtually identical results were obtained. (ER 246-50.) Thus, the demotions were statistically just as likely to have been the result of the height, weight or color of the supervisors as their age. The district court recognized this flaw in Dr. Pfeffer's opinion and concluded that:

> "First, the samples here involved are such as not to afford a persuasive basis and, indeed, it develops that the statistical analysis would suggest that there might well have been numbers of other factors besides age, but of a similar character, that might have entered into the determinations." (Pet., App. B, p. 24.)

Turning to Dr. Driver, the district court found that "[t]he hypotheses and assumptions upon which [he] . . . predi-

cated his opinion were clearly erroneous." (Pet., App. B, p. 21.)

Second, plaintiffs argue that the district court rejected their experts' testimony because the sample size upon which certain opinions were derived was too small. To the contrary, the court's decision clearly reveals that the experts' testimony was not rejected (*see* Pet., App. B, p. 25), but simply found "not very persuasive." (Pet., App. B, p. 24.)

Relying upon the erroneous premise that the district court rejected their statistical evidence because the group being analyzed was too small, plaintiffs argue that since the ADEA applies to employers with twenty or more employees (*see* 29 U.S.C. § 630(b)), a sample size of twenty cannot be deemed too small for reliable statistical analysis. In so arguing, plaintiffs fail to recognize that different considerations are involved in determining a reliable sample size for statistical purposes from those involved in establishing jurisdictional limits. Plaintiffs fail to identify any evidence that Congress, in establishing the jurisdictional parameters of the ADEA, also intended to establish an inexorable rule for trial courts in reviewing statistical evidence and thereby overturn this Court's mandate to such courts to evaluate the credibility of witnesses and weigh evidence. *United States v. Yellow Cab Co.*, 338 U.S. 338 at 341-42.

The weight to be given statistical evidence depends on "all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977). Thus, although no bottom line can be set to determine how large a sample size must be to be reliable, sample size is clearly a relevant factor to be evaluated by the trier of fact (such as the district court below) when considering statistical evidence. *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). In any event, plaintiffs err in asserting that the

"[r]ejection of statistical evidence in employment discrimination cases because the group being analyzed was too small," has not occurred with respect to groups as large as twenty. (Pet., p. 11.) In *White v. City of San Diego*, 605 F.2d 455, 461 (9th Cir. 1979), for example, statistical evidence based on groups of both 28 and 22 was found "too small to be meaningful."

C. Any Reference by the District Court to a Statistics Treatise Was Entirely Proper and in No Way Violated Plaintiffs' Rights to Due Process.

Although not argued below, plaintiffs now assert that the district court's alleged reference at trial to a statistics treatise not in evidence violated their due process rights under the United States Constitution.[3] Plaintiffs cannot nor do they cite any cases in support of this argument. This is because it is well established under federal law that a trial court is entitled to take judicial notice of such "learned treatises."[4] *United States v. 1,078.27 Acres of Land*, 446 F.2d 1030, 1034 (5th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) ("we are entitled to rely upon the experienced trial judge to separate the wheat from the chaff and thus consider only such matters as he might properly judicially notice"); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 876 (9th Cir. 1969), *cert. denied*, 396 U.S. 834 (1970) ("[t]he presumption on appeal is that the trial judge disregarded incompetent evidence and relied upon competent evidence."); *Application of Hartop*, 311 F.2d 249, 253 (C.C.P.A. 1962)

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[3]While plaintiffs argued to the lower courts that the district court's alleged reference to the statistics treatise was error, they did not assert any violation of the United States Constitution.

[4]Plaintiffs' argument that the statistics treatise was inadmissible hearsay is without merit. The book is a "learned treatise" and, therefore, falls within the exception to the hearsay rule found in Federal Rule of Evidence 803(18).

(court properly judicially noticed two standard reference works by name and relied upon them in reaching a decision.)

None of the cases cited by plaintiffs (*see* Pet., p. 13) are controlling here because they either do not stand for the proposition asserted by plaintiffs or are inapposite. For example, in *People v. Archerd*, 3 Cal. 3d 615, 638, 91 Cal. Rptr. 397, 477 P.2d 421 (1970), the court specifically found that "[i]t was proper for the [trial] court to consult textbooks concerning the nature of the properties of insulin, as it is entitled to take judicial notice on its own of the expertise of the doctors testifying at the trial." Neither *Hartford Accident & Indemnity Co. v. WCAB*, 132 Cal. App. 3d 796, 183 Cal. Rptr. 440 (1982) nor *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), address the issue of judicial notice of learned treatises.

Most importantly there is no evidence of unfairness here; nothing in the record indicates that the district court relied upon the statistics treatise in making its findings. On the contrary, the court's extensive discussion of the evidence presented by each party (*see* Pet., App. B. pp. 14-27) belies any inference that it reached its decision based on extrinsic evidence.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN P. PEPE,

Attorney for Respondent
Trans World Airlines, Inc.

Of Counsel:

T. WARREN JACKSON,
O'MELVENY & MYERS.

August 4, 1983.

APPENDIX A.

Defendant's Answers and Objections to Plaintiffs' First Set of Interrogatories.

United States District Court, Central District of California.

Mary Hedley, Herb McFarland, Asbery Rainey, Jr., Frank Serpe and Frank Stafford, Plaintiffs, vs. Trans World Airlines, Inc., Defendant. Case No. CV 79-0907 RJK (Tx).

INTERROGATORY NO. 12

With respect to all complaints of age discrimination against you through an administrative body (*e.g.*, a state employment agency of the U.S. Department of Labor) since 1967, please furnish the following information:

a. Names of complainant and date of birth.

b. Name of agency handling the complaint and identification of proceeding (*e.g.*, name and number).

c. Nature of complaint, *i.e.*, job involved, location, date of alleged discrimination, what action by you was complained of (*e.g.*, termination, demotion, forced retirement or other).

d. Is the complaint still being handled by the agency, and if not, was it settled while with the agency, abandoned by the complainant, completed by the agency and followed by a lawsuit, or none of the foregoing. (If none, state what conclusion occurred).

OBJECTIONS TO INTERROGATORY NO. 12

See objections to Interrogatory No. 1, which by this reference are incorporated herein.

Defendant further objects to Interrogatory No. 12 insofar as it requests information for a period prior to January 1, 1973 on the following grounds:

Plaintiffs' charges of age discrimination were filed with the Department of Labor on January 23, 1977. Defendant

submits that events which occurred more than four years prior to said charges are irrelevant to this action. Further support of this four-year cutoff date is that plaintiffs have not filed any charges of age discrimination with respect to this earlier period and that the Age Discrimination in Employment Act provides for an even shorter period, namely, two years and three years in the case of willful violations, with regard to the statute of limitations for accrual of damages. Therefore, the interrogatory seeks information that is not relevant to the subject matter of this lawsuit and will not tend to lead to the discovery of admissible evidence; and for the reasons hereinabove stated the interrogatory is overbroad and therefore burdensome and oppressive.

Defendant for the purpose of the response to this interrogatory and without waiving the foregoing objections shall answer for the period after January 1, 1973.

ANSWER TO INTERROGATORY NO. 12

Defendant is informed and believes, at present, based on a review of its personnel files at the Los Angeles Reservations Office and its facility at Los Angeles International Airport ("LAX") that except for the plaintiffs herein no complaints of age discrimination have been filed.

INTERROGATORY NO. 13

With respect to all complaints of age discrimination against you made in a lawsuit since 1967, please furnish the following information:

a. Name of complainant and date of birth.

b. Court where case was filed and all other courts in which it was pursued along with the case name and number in each court.

c. Nature of complaint, *i.e.*, job involved, location, date of alleged discrimination, what action by you

was complained of (*e.g.*, termination, demotion, forced retirement or other).

d. Is the suit still pending, and if not, was it settled, abandoned, tried, or appealed?

e. If the case was settled, tried, or appealed, state briefly the terms of settlement, judgment of the trial court, and result on appeal. (If appeal resulted in published opinion, give citation.)

OBJECTIONS TO INTERROGATORY NO. 13

See objections to Interrogatory No. 12 which by this reference are incorporated herein.

ANSWER TO INTERROGATORY NO. 13

Defendant is informed and believes, at present, based on a review of its personnel files at the Los Angeles Reservations Office and LAX that except for the plaintiffs herein no lawsuits alleging age discrimination by defendant have been filed.

DATED: October 8, 1979.

O'MELVENY & MYERS
T. WARREN JACKSON
By /s/ Theo. Warren Jackson
T. Warren Jackson
Attorneys for Defendant
Trans World Airlines, Inc.

Defendant's Supplemental Answers and Objections to Plaintiffs' First Set of Interrogatories.

United States District Court, Central District of California.

Mary Hedley, Herb McFarland, Asbery Rainey, Jr., Frank Serpe and Frank Stafford, Plaintiffs, vs. Trans World Airlines, Inc., Defendant. Case No. CV 79-0907 RJK (Tx).

The interrogatories and responses hereto should be deemed incorporated by this reference to Defendant's Answers and Objections to Plaintiffs' First Set of Interrogatories.

INTERROGATORY NO. 14

Have you received any complaints of age discrimination which were presented to you by a union representative since 1967?

OBJECTIONS TO INTERROGATORY NO. 14

Defendant objects to Interrogatory No. 14 on the grounds, that it is vague insofar as it does not indicate the locational frame of reference. Defendant for the purpose of the response to this interrogatory and without waiving this objection shall refer to its reservations office at 1543 Shatto Street, Los Angeles, California. In addition, defendant objects to this interrogatory on the grounds that insofar as it seeks information regarding a union representative it is not relevant to the subject matter of this lawsuit and does not tend to lead to the discovery of admissible evidence since no union is a party to this action and plaintiffs were neither represented by nor members of any union at all times relevant herein.

Defendant further objects to Interrogatory No. 14 insofar as it requests information for a period prior to January 1, 1973 on the following grounds:

Plaintiffs' charges of age discrimination were filed with the Department of Labor on January 23, 1977. Defendant

submits that events which occurred more than four years prior to said charges are irrelevant to this action. Further support of this four-year cutoff date is that plaintiffs have not filed any charges of age discrimination with respect to this earlier period and that the Age Discrimination in Employment Act provides for an even shorter period, namely, two years and three years in the case of willful violations, with regard to the statute of limitations for accrual of damages. Therefore, the interrogatory seeks information that is not relevant to the subject matter of this lawsuit and will not tend to lead to the discovery of admissible evidence; and for the reasons hereinabove stated the interrogatory is overbroad and therefore burdensome and oppressive.

Defendant for the purpose of the response to this interrogatory and without waiving the foregoing objections shall answer for the period after January 1, 1973.

ANSWER TO INTERROGATORY NO. 14

No.

DATED: October 16, 1979

O'MELVENY & MYERS
T. WARREN JACKSON
By /s/ Theo. Warren Jackson
T. WARREN JACKSON

Attorneys for Defendant
Trans World Airlines, Inc.

Declaration of James L. Kessler.

I, JAMES L. KESSLER, declare and testify as follows:

If called to testify, I could and would testify to the following facts which are within my personal knowledge:

1. I am employed by Trans World Airlines, Inc. ("TWA") as Regional Manager Employment and Personnel Administration, 7001 World Way West, Los Angeles, California. My duties include maintenance of personnel records, recruiting, placement and affirmative action for TWA's Western Region. In addition, I have responsibility for assisting TWA's legal counsel in the conduct of litigation in the Western Region, including the instant litigation.

2. TWA is a worldwide air carrier with facilities in over 50 cities domestically and over 100 cites worldwide. TWA maintains eight Reservation Sales Offices in the United States, which are responsible for booking airplane seat reservations for the travelling public, located in San Francisco, Los Angeles, St. Louis, Chicago, Pittsburgh, Boston, New York and Philadelphia.

3. System-wide, the area to which the plaintiff's interrogatories are directed, TWA employs approximately 40,000 employees. TWA employs approximately 2,000 people in the eight domestic reservation offices. Almost without exception, each of TWA's different facilities particularly the Reservation Sales Offices, involves independent and separate management and control.

4. In or about January 1977, a reorganization at TWA's Los Angeles Reservation Sales Office was effected, pursuant to a system-wide plan. This reorganization resulted in the reclassification of the plaintiffs herein from supervisory to nonsupervisory positions. The foregoing reorganization was also independently implemented at TWA's other domestic reservation offices. Thus, the process that led to

the reclassification of plaintiffs herein was conducted solely at the Los Angeles Reservation office.

5. Certain of TWA's employees are represented for the purpose of collective bargaining by one of four unions, as follows:

International Association of Machinists and Aerospace Workers: Fleet service helpers, mechanics, ramp service, flight kitchen and aircraft cleaning employees;

Air Line Pilots Association: pilots;

International Federation of Flight Attendants: flight attendants; and

Transport Workers Unions: flight dispatchers.

Employees in TWA's domestic area reservation offices are not represented by a union.

6. TWA has extensive personnel records maintained in 12 different locations throughout the United States. Almost without exception, employee personnel records are maintained at the employee's current work location. TWA also has extensive computer records regarding all of its employees, maintained in Kansas City, Missouri, however, records such as salary, promotion, demotion and transfer information for the period prior to 1970 are not maintained.

7. I have read plaintiffs' first set of interrogatories, TWA's answers and objections to said interrogatories and plaintiffs' motion to compel answers to interrogatories. In order to compile the information requested by the plaintiffs regarding all TWA's facilities, employees and unions for the requested period, a search of all TWA employees' personnel files would have to be conducted; TWA estimates that it will require the full-time effort of three of its regular employees for approximately one month.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Los Angeles County, California, this 8th day of November, 1979.

/s/ James L. Kessler
James L. Kessler

Civil Minutes — General.

United States District Court, Central District of California.

Case No. CV 79-907-RJK. Title Hedley et al. v. Transworld Airlines. Date 11/19/79

Present: Hon. Robert J. Kelleher, Judge. James H. Haggard, Deputy Clerk. N/A, Court Reporter. Attorneys Present for Plaintiffs: N/A. Attorneys Present for Defendants: N/A.

Proceedings: MINUTE ORDER

The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and good cause appearing therefor, hereby DENIES Plaintiff's Motion to Compel Answers to Interrogatories on the ground that such interrogatories are burdensome and that Plaintiff has made an insufficient showing that the information requested therein is relevant or likely to lead to the discovery of relevant evidence.

The clerk shall mail a copy of this Order to counsel.

cc: Amil Roth
Suite 1204
1888 Century Park East
Los Angeles, CA 90067

T. Warren Jackson
O'Melveny & Myers
611 West Sixth St.
Los Angeles, CA 90017

Reporter's Transcript: Remarks From the Court.

. . . . . .

in this cause, your Honor.

THE COURT: Well, I might tell you that the Court during the course of and at the conclusion of Dr. Driver's —

MR. ROTH: I was referring to — apologies.

THE COURT: Let me just say that during the course of it and at the conclusion of it, the Court contemplated on its own motion a reversal of a prior ruling, and that is affording to the plaintiff an opportunity to call its rejected expert on statistics and otherwise, McMenamin, or whatever his name was, or otherwise.

One of the bafflements to the Court which has been expressed previously is the kind and character of pretrial preparation of this case and the reduction thereof to documents upon which the case could be informatively tried by the Court. One of the areas is the expert opinion. The Court will say, and this is prompted by your comment, Mr. Roth, concerning Dr. Driver, it not having been controverted, that the Court concluded that Dr. Driver's testimony fell on its own weight. And, therefore, it expressed as it did some comments in that regard. And because it took that view, it abandoned any thought of its own motion of saying to the defendant it could bring in some expert testimony.

MR. ROTH: I had thought I addressed my remarks to the Court with respect to Dr. Pfeffer. At the opening week of trial herein, one of the first witnesses was Dr. Irving Pfeffer, who testified as an expert statistician.

THE COURT: Yes. Let me just say the Court well recalls that, and the comments just made with respect to Dr. Driver were made in contemplation of Dr. Pfeffer having testified in substantially the same manner; that is, as an

expert, as a statistician. And the comments made as purportedly applied solely to Dr. Driver applied to Dr. Pfeffer also.

MR. ROTH: In light of the Court's explanation with respect to Dr. Pfeffer and it is the position of plaintiffs' counsel that plaintiffs accept the Court's observation that the Court doubts that the Court's decision would be changed by allowing plaintiffs further to argue their case, and unless the Court wishes guidance in any particular matter, we are willing to let findings and conclusions be furnished in whatever manner the Court chooses.

THE COURT: And that the matter stands submitted thereupon, is that your suggestion?

MR. ROTH: Yes, your Honor.

THE COURT: Yes.

What's the defendant's position?

MR. JACKSON: Defendant will stand with the

. . . . . .

THE COURT: Well, you cast it in terms of the urn with the black and white balls in it so we will stay away from any of this business of the process by which it's done. The hypothetical is as stated to you in terms of eleven black and nine white, and it is a random selection. And the question is what is the probability that six or more black will be selected randomly from seven selections.

THE WITNESS: The answer to that, your Honor, is that if we use a test which is referred to as Fisher's true test, we can come up with the number .0579, with the assumptions that are built into that test.

THE COURT: All right. Put your next question.

BY MR. JACKSON:

Q Directing your attention now to Exhibit AW. From a population of twenty, eleven of whom are over 5 feet 8 inches in height and nine of whom are under 5 feet 8 inches in height, what is the probability that six or more individuals under 5 foot eight inches —

A. The question is over.

Q. I'm sorry. Over 5 foot 8 inches. I'm sorry.

— are selected, given a total of seven selections, and assuming random sampling?

MR. ROTH: Objection. He didn't read the question as written, your Honor.

THE COURT: Overruled.

You may answer.

MR. ROTH: Do you — I respectfully ask that the question be re — the Court have the question reread since I mistakenly assumed we were going to have what is written here, and I'm not sure what the question is, your Honor.

THE COURT: Do you understand the question, Dr. Pfeffer?

THE WITNESS: I understand the question, sir. And the question has been changed from what was presented.

THE COURT: Mr. Jackson, why do you deviate from the written submissions of last evening?

MR. JACKSON: Your Honor, the written submission did not include the term "random." I am simply putting that in so that — for the ease of this witness.

THE COURT: All right. Hold on.

Do you understand that what you have just been asked is identical to that which was submitted to you last night, marked as Exhibit AW, except that the word "random" has been added?

THE WITNESS: That's correct, sir. I understand that now, sir.

THE COURT: All right.

THE WITNESS: And that —

THE COURT: All right. You proceed to answer the question. Do you have it in mind? Do you understand it?

THE WITNESS: Yes, I do.

THE COURT: All right. You go ahead and answer it.

THE WITNESS: Given the assumptions that this is random, and given the assumptions which I must take from the exhibit because I have not had access to the tables since last night, by approximation I would have to assume that the number would be approximately .0579 as shown.

I was only able to approximate it because the Fisher table that is probably the basis for deriving this probability is part of a collection of statistical tables published in England to which we would not have access except with library research, your Honor.

THE COURT: All right.

Put your next question.

BY MR. JACKSON:

Q. Directing your attention to Exhibit AY. From a population of twenty, eight of whom weigh —

A. Is this AY?

Q. AY.

A. Yes, sir.

Q. — eight of whom weigh 155 pounds or more, and twelve of whom weigh under 155 pounds, what is the probability that six or more individuals in the 155-and-over category are selected, given a total of seven selections, and assuming, I insert, random sampling without replacement?

A. Your Honor, I did not have an opportunity to work this problem out, except in terms of laying other methodology for it. But I would have to estimate that again an approximation to the Fisher table, which was not available to me, would be of the order of .0044 as shown. Without having access to the arithmetic, I would have difficulty in verifying that number; but the order of magnitude appears correct.

THE COURT: The fact that the population is described in terms of height or weight or color doesn't matter at all for the purpose of coming to your statistical answer, does it?

THE WITNESS: That's correct, sir.

Two of the illustrations are exact illustrations with just that variable.

MR. JACKSON: That is correct.

BY MR. JACKSON:

Q. Now, directing your attention to Exhibit AX. From a population of twenty, twelve of whom are males and eight

of whom are females, what is the probability that six or more males are selected given a total of seven selections and assuming sampling — excuse me — assuming random sampling without replacement?

A. Again, your Honor, if we're assuming random sampling, the estimate for a Fisher true test table would be of the order of magnitude of .1056. Again it's only an estimate on my part.

Q. And that is what —

A. Without access to the calculations or to the table. It's of that order of magnitude.

Q. And that probability is set forth on Exhibit AY?

A. That would be the order of magnitude.

Q. AY?

A. Yes.